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Civil Procedure

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Civil Procedure

Civil Procedure; appointment of referees in real property partition actions

Code of Civil Procedure §§ 872.570, 872.571 (new).

AB 3413 (Moore); 1986 STAT. Ch. 689

Sponsor: Author

Under existing law, referees may¹ be appointed by the court to divide real property in partition actions.² Existing law further provides that a court may appoint a referee to ascertain facts necessary to determine the status and priority of lienholders, and to suggest an equitable division of the property.³

With the enactment of Chapter 689, any party to a partition action involving real property worth less than \$200,000 may move for the appointment of a referee.⁴ This motion may be made sixty days after service of the complaint upon all defendants in the action, or thirty days after the last defendant has filed an answer.⁵ The court shall⁶ appoint a referee to make preliminary factual determinations regarding the rights and liabilities of the parties to the action within thirty

1. See *O'Bryant v. Bosserman*, 94 Cal. App. 2d 353, 356, 210 P.2d 739, 741 (1949) (holding that the failure to appoint a referee does not justify reversal of the judgment).

2. CAL. CIV. PROC. CODE § 873.010. See also 64 Op. Att'y Gen. 762, 768-69 (1981) (discussing appointment of referee as an enforcement mechanism in a partition action). In a partition action, the right of common possession of the whole property interest is transformed into a right of exclusive possession, so that each tenant in common owns individually the same proportional interest that was owned before the partition action. *Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 539, 81 P.2d 533, 552 (1938).

3. CAL. CIV. PROC. CODE § 872.630.

4. *Id.* § 872.570(a), (b).

5. *Id.* § 872.570(b).

6. *Id.* § 872.570(d). Cf. *Richmond v. Dofflemeyer*, 105 Cal. App. 3d 745, 755, 164 Cal. Rptr. 727, 732 (1980).

The word "shall" as used in [CAL. CIV. PROC. CODE § 873.010] should be construed to require the appointment of a referee only where it is necessary . . . and should not be construed to require the expense and time-consuming services of a referee where the court has adequate evidence before it to render its decision.

Id.

days⁷ of such motion.⁸ The referee must also recommend whether to divide the property, or sell the property and distribute the proceeds among the parties.⁹ The referee must submit findings to the court in writing within sixty days of being appointed,¹⁰ and upon receipt of the report the court will hear objections and reserve a date for trial.¹¹

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7. CAL. CIV. PROC. CODE § 872.570(d).

8. *Id.* § 872.570(b).

9. *Id.*

10. *Id.*

11. *Id.* § 872.570(c).

Civil Procedure; attorney's fees

Labor Code § 218.5 (new); § 1128 (amended).

SB 2570 (Lockyer); 1986 STAT. Ch. 1211

Sponsor: California Teamsters Public Affairs Council

Under existing law, attorney's fees are recoverable by the prevailing party in a suit to compel arbitration of a collective bargaining agreement.¹ Existing law also allows a district attorney or wage claimant to bring a civil action to recover nonpayment of wages² from an employer.³ Chapter 1211 entitles the prevailing party in an action for the recovery of specified payments to employees⁴ to recover reasonable attorney's fees and costs if either party requests fees upon the initiation of the suit.⁵ Chapter 1211 also provides for the recovery

1. CAL. LAB. CODE § 1128(a). Attorney's fees are not awarded, however, if the other party has raised substantial and credible issues involving complex or significant questions of law or fact regarding whether or not dispute is arbitrable under the agreement. *Id.* Moreover, attorney's fees may be recovered by the prevailing appellee on an appeal of the arbitrator's decision unless the appellant has raised substantial issues involving complex or significant questions of law. *Id.* § 1128(b).

2. *Id.* § 200(a) (definition of wages).

3. *Id.* § 218.

4. *Id.* § 218.5 (includes actions for nonpayment of wages; fringe benefits; and health, welfare, or pension fund contributions).

5. *Id.* (Chapter 1211 is not applicable to actions brought by the Labor Commissioner, a surety issuing a bond, or an action to enforce a mechanics' lien). *See also* CAL. BUS. & PROF. CODE §§ 7000-7173 (the Contractors' State License Law, which includes the sections

of attorney's fees by the prevailing party in an action to compel compliance with a decision or award of an arbitrator.⁶

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concerning sureties issuing bonds applicable to Chapter 1211); CAL. CIV. CODE §§ 3109-3154 (sections concerning mechanics' liens applicable to Chapter 1211).

6. CAL. LAB. CODE § 1128(c). Section 1128(c) includes decisions and awards of a grievance panel. Attorney's fees will not be awarded if the other party has raised substantial issues involving complex or significant questions of law. *Id.* Chapter 1211 does not apply to public employment. *Id.* § 1128(d).

Civil Procedure; child and spousal support

Civil Code § 4384.5 (new); Government Code § 29416 (new).

AB 3242 (Bates); 1986 STAT. CH. 1046

Sponsor: California Family Support Council

Support: Department of Social Services; California National Organization of Women, Inc.

Under existing law, a money judgment is enforceable for ten years from the entry of the judgment.¹ Existing law provides, however, that enforceability may be extended² by a judgment-creditor filing an application for renewal of the money judgment.³ Furthermore, a judgment for child or spousal support may be enforced after ten years from the date of judgment entry only at the discretion of the court.⁴ With the enactment of Chapter 1046, a judgment for child or spousal support may be extended past the original ten-year enforceability period by filing an application for judgment renewal in the manner specified above for money judgments.⁵ Once renewed, however, the judgment cannot be renewed again for five years from the time of the previous renewal.⁶

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1. CAL. CIV. PROC. CODE § 683.020.

2. *Id.* § 683.120 (the new period of enforceability extends for 10 years from the date the application for renewal is filed).

3. *Id.* The application for renewal is filed with the court in which the original judgment was rendered. *Id.*

4. CAL. CIV. CODE § 4384 (effect of request for enforcement of child and spousal support judgments after 10 years).

5. *Id.* § 4384.5.

6. *Id.*

Civil Procedure; choice of law and forum

Civil Code § 1646.5 (new); Code of Civil Procedure § 410.40 (new); § 410.30 (amended).

AB 3223 (Harris); 1986 STAT. Ch. 968

(Effective September 22, 1986)

Sponsor: Richard Mosk—Attorney and Arbitrator

Under existing law, if a transaction bears a reasonable relation to California, the transacting parties may agree¹ that California law governs the parties' rights and duties.² Chapter 968 provides, however, that parties to any contract³ relating to a transaction with an aggregate value not less than \$250,000 may agree, subject to certain exceptions,⁴ that California law governs their contractual rights and duties, in whole or in part, regardless of whether the contract or transaction bears a reasonable relation to California.⁵ In addition, if the value of the transaction exceeds \$1,000,000, and the parties have chosen California law to govern their contractual relations, Chapter 968 permits any person to maintain an action based on that transaction against a nonresident person or foreign corporation that expressly submits to the jurisdiction of California in the contract.⁶

Under existing law, when a court finds that, in the interest of substantial justice, an action should be heard in a forum outside of California, the court must stay or dismiss the action in whole or in part upon any conditions that are just.⁷ Chapter 968 clarifies existing law by stating that the domicile or residence in California of any party to the action must not preclude the court from staying or dismissing the action.⁸ Chapter 968 further provides that a court may not grant a motion based upon the doctrine of forum non conveniens

1. CAL. COM. CODE § 1105(2) (limiting the parties' power to choose governing law).

2. *Id.* § 1105(1).

3. Chapter 968 applies to any contract, agreement, or undertaking. CAL. CIV. CODE § 1646.5.

4. Chapter 968 does not apply to any contract that (1) is for labor or personal services; (2) relates to any transaction primarily for personal, family, or household purposes; or (3) is governed by California Commercial Code §§ 2402 (rights of seller's creditors against sold goods), 4102 (bank deposits and collections), 6102 (bulk transfers), 8106 (registration of certificated and uncertificated securities), or 9103 (perfection of security interests in multiple state transactions), as provided in California Commercial Code § 1105(2). *Id.*

5. *Id.* (Chapter 968 is an exception to Code of Civil Procedure § 1646).

6. CAL. CIV. PROC. CODE § 410.40.

7. *Id.* § 410.30(a).

8. *Id.*

when a person has brought an action against a foreign corporation or nonresident person based upon a transaction involving not less than \$1,000,000, in which the parties to the transaction chose California law to govern their contractual relations, and the foreign corporation or nonresident person has expressly submitted to the jurisdiction of California in the contract.⁹

COMMENT

California courts usually respect choice of law provisions,¹⁰ unless (1) the law of the chosen state has no substantial relationship to the parties or the transaction, and there is no other reasonable basis for the parties' choice, or (2) applying the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in determining the particular issue.¹¹ Chapter 968 raises a serious conflict of law issue by permitting parties to a transaction valued at greater than \$250,000 to select California law as governing law, whether or not the contract or transaction bears any reasonable relation to California.¹²

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9. *Id.* § 410.30(b).

10. *See* *Smith, Valentino & Smith, Inc. v. Superior Court*, 17 Cal. 3d 491, 494, 551 P.2d 1206, 1208, 131 Cal. Rptr. 374, 376 (1976) (courts will generally respect the parties' right to choose the law governing their transaction).

11. *See* *Gamer v. DuPont Walston, Inc.*, 65 Cal. App. 3d 280, 288, 135 Cal. Rptr. 230, 234 (1976) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) (1971)). Requiring a "reasonable relation" is consistent with California statutory language. *See* CAL. COM. CODE § 1105(a) (permitting parties to a contract to select a law of a state that bears a reasonable relation to the transaction). *See also* *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 407 (1927) (discussing the test for "reasonable relation"). *See generally* 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* § 61 (8th ed. 1973 & Supp. 1984).

12. CAL. CIV. CODE § 1646.5. *Compare id.* with *Gamer v. DuPont Walston, Inc.*, 65 Cal. App. 3d 280, 288, 135 Cal. Rptr. 230, 235 (1976) (holding that the contract must bear a reasonable relation to a state before the parties may select the law of that state to govern their contractual relations).

Civil Procedure; Civil Discovery Act of 1986

Code of Civil Procedure §§ 2016, 2017, 2018, 2019, 2020, 2021, 2023, 2024, 2025, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2036.1, 2036.2, 2036.5, 2037, 2037.1, 2037.2, 2037.3, 2037.4, 2037.5, 2037.6, 2037.7, 2037.8, 2037.9 (repealed); §§ 2016, 2017, 2018, 2019, 2020, 2021, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2033.5, 2034, 2035, 2036 (new).

AB 169 (Harris); 1986 STAT. Ch. 1334

Sponsor: State Board of California; Judicial Council Joint Commission on Discovery

Opposition: California Land Title Association; State Farm Insurance Companies

(Effective July 1, 1987)*

AB 1334 (Harris); 1986 STAT. Ch. 1336

Sponsor: State Bar of California; Commission on Discovery
(Effective July 1, 1987)

Redefines the general scope of discovery; codifies existing case law regarding discovery of insurance agreements; defines extent of protection for opponent's work product; lists methods of discovery and limitations of use; expands contents of a deposition subpoena for testimony; dispenses with affidavit accompanying a deposition subpoena for production of business records; modifies delivery of business records; requires witness fees to accompany deposition subpoena; requires the person testifying for an organization to be the most qualified concerning matters sought; includes an organization's employees or agents within the list of persons who may be designated to testify for an organization; prohibits objections to a defective deposition notice to be served within three days of deposition; permits a party's employee to be compelled for a deposition by proper service of a deposition notice; deletes power to compel an immediate beneficiary to an action by service of a deposition notice; permits a deposition to be recorded by audio tape; limits persons who may operate video equipment for a deposition to be

* Chapter 1334 was signed by the Governor in reliance on representations committing the author of Chapter 1334 to correct an amendment which was inserted late in the legislative process. The amendment would alter existing work product protection for any first-party or third-party action brought against an insurance company. The correction is to occur at the next legislative session. Letter from Governor George Deukmejian to Members of the California Assembly (Sept. 29, 1986) (discussing conditions on which Chapter 1334 was signed into law). See also CAL. CIV. PROC. CODE § 2018(e) (provision altering existing work product privilege).

used at trial; provides for waiver of objections to depositions that are not timely raised; revises provisions for motion to compel answers or production; limits number of depositions to one per person; permits use of expert witness information at trial despite witnesses ability to testify; modifies objections to written depositions and time to object; modifies previewing of written depositions by deponent; limits number of interrogatories to thirty-five; provides procedures for exceeding statutory limit on interrogatories; prohibits continuing interrogatories; modifies sanctions for failing to serve response to interrogatories; modifies use of interrogatories at trial; modifies compliance with inspection demands; clarifies response to inspection demands; provides a defendant with the right to demand a personal injury plaintiff to submit to one physical examination; modifies procedures for obtaining mental examinations; modifies conduct of examinations; provides reciprocal right to examination reports; limits the number of requests for admission to thirty-five; provides procedures for exceeding statutory limit of requests for admissions; prohibits a request for admission requiring application of law to fact; requires all valid requests for admission to be answered; changes procedures for deeming a failure to respond to request for admission as an admission; clarifies sanctions for unwarranted refusal to admit to request for admission; changes times for exchange of expert witness lists; specifies protective orders for expert witnesses; modifies expert witness declarations; provides for supplemental exchange of expert witness lists; restricts distance a deposed expert witness must travel to deposition; enacts strict conditions to augment an expert witness list; permits parties to stipulate modifications of discovery procedures.

Prior law, repealed by Chapter 1334 and Chapter 1336, contained comprehensive provisions governing pretrial discovery in civil actions.¹ Chapter 1334 and Chapter 1336 enact new comprehensive provisions governing pretrial discovery in civil actions.² The new

1. 1986 Cal. Stat. ch. 1334, sec. 1, at _____(repealing CAL. CIV. PROC. CODE §§ 2016-2036.2); 1986 Cal. Stat. ch. 1336, sec. 3, at _____(repealing CAL. CIV. PROC. CODE §§ 2037-2037.9).

2. See CAL. CIV. PROC. CODE §§ 2016-2021, 2023-2036. As originally introduced, Chapter 1334 and Chapter 1336 are the work-product of the State Bar—Judicial Council Joint Commission on Discovery (Commission) whose goal was to rewrite the law on discovery, with an emphasis on clarification and simplicity. State Bar of California, News Release (Jan. 25, 1986) (State Bar's Governing Board approves proposed California Civil Discovery Act). The Commission is a broad-based group of lawyers and judges representing a variety of points of view; and, as originally introduced, Chapter 1334 and Chapter 1336 were the product of numerous meetings of the Commission and subcommittees thereof over a two-year period. STATE BAR-JUDICIAL COUNCIL JOINT COMMISSION ON DISCOVERY, PROPOSED CALIFORNIA CIVIL

provisions under Chapter 1334 and Chapter 1336 incorporate prior law and procedures, codify case law which interpreted prior law and procedures, and make both major and minor changes to prior discovery law.³

I. SCOPE OF DISCOVERY

A. Definition of Discovery in General

Under Chapter 1334, the general scope of discovery is defined and incorporated into the provisions of Chapter 1334 and 1336.⁴ Unless otherwise limited by a court order, Chapter 1334 defines the general scope of discovery as follows: (1) allowing any party to obtain any matter, not privileged, that is relevant to the subject matter involved in the pending action,⁵ or to the determination of any motion made in that action, if the matter is admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence; (2) relating to the claim or defense of the party seeking discovery, or of any party to the action; (3) obtaining the identity and location of persons having knowledge of any discoverable matter, as well as the existence, description, nature, custody, condition, and location of any writing or other tangible thing; and (4) being limited by the work product protection provisions of Chapter 1334, unless the information to be discovered is identifying information concerning persons, writings, or tangible things.⁶

DISCOVERY ACT OF 1986 (Proposed Act and Reporter's Notes) (January 1986) [hereinafter cited as REPORTER'S NOTES]. Chapter 1334 and Chapter 1336, as enacted, represent the the State Bar-Judicial Council Joint Commission on Discovery's proposed legislation with amendments made from exhaustive meetings and negotiations with interested groups. Letter from Terrance Flanigan, State Bar Legislative Representative, to Governor George Deukmejian (Sept. 5, 1986) (State Bar's request for the Governor to sign into law AB 169 and AB 1334) (on file at the *Pacific Law Journal*).

3. See Conversation with James E. Hogan, Reporter to the State Bar-Judicial Council Joint Commission on Discovery (Oct. 7, 1986) (notes on file at the *Pacific Law Journal*).

4. REPORTER'S NOTES, *supra* note 2, at 3 (general scope of discovery). This definition of scope does not apply to "physical and medical examinations, where discovery continues to be restricted to conditions that are actually 'in controversy.'" *Id.*

5. CAL. CIV. PROC. CODE § 2016(a)(1) (action means a civil action or a special proceeding). See generally *id.* §§ 307-1062.10 (civil actions); 1063-1822.59 (special proceedings of a civil nature).

6. *Id.* § 2017(a). See also *infra* notes 10-13 and accompanying text (work product protection provisions of Chapter 1334).

The Commission . . . ultimately decided to adhere to a definition of the scope of discovery in terms of relevance to the *subject matter*, instead of the narrower

B. Financial Worth of a Party

Existing case law recognizes a broad right of discovery concerning information relating to the liability insurance coverage that may be available to satisfy a judgment, yet prior statutory law contained no specific provisions in this area.⁷ Chapter 1334 codifies existing case law by providing that a party may discover (1) the existence and contents of any agreement under which any insurance carrier may be liable for either a judgment that may be entered in the action, or to indemnify or reimburse for payments made to satisfy a judgment; and (2) whether the carrier is disputing the agreement's coverage or the claim involved in the action, but not the nature and substance of the carrier's dispute.⁸

II. PROTECTION FOR OPPONENT'S WORK PRODUCT

Under prior law, California policy was to preserve the rights of attorneys in preparing cases for trial with the degree of privacy necessary to encourage them to prepare thoroughly for a case, to investigate both favorable and unfavorable aspects of a case, and to prevent an attorney from taking undue advantage of an opponent's industry or efforts.⁹ Chapter 1334 incorporates this policy, and provides that work product protection encompasses not only trial preparation activities, but also the product of work undertaken in preparation of litigation.¹⁰ Furthermore, the work product protection

standard of relevance to the *issues*. Its decision in this regard was heavily influenced by the demonstrated awareness of trial and appellate courts that the broader formulation does not signify that a party seeking discovery has an untrammelled *right* to range all over the subject matter involved in the action, regardless of the actual issues in the case. *See, e.g., Hoffmann Corp. v. Superior Court* [172 Cal. App. 3d 357, 218 Cal. Rptr. 355 (1985)]. As the Supreme Court was careful to point out in its landmark opinion in *Greyhound Corp. v. Superior Court* [56 Cal. 2d 355, 383-84, 364 P.2d 266, 279-80, 15 Cal. Rptr. 90, 103-04 (1961)], a trial court, in considering requests for discovery, has the discretion to "weigh the relative importance of the information sought against the hardship which its production might entail." The Commission concluded that this discretion was so important as a counter-balance to the broad standard of discovery relevance, that it should be written into the statute, and not left to implication.

REPORTER'S NOTES, *supra* note 2, at 4 (limiting scope).

7. REPORTER'S NOTES, *supra* note 2, at 3-4 (financial worth of a party). *See, e.g., Smith v. Superior Court*, 189 Cal. App. 2d 6, 11 Cal. Rptr. 165 (1961); *Pettie v. Superior Court*, 178 Cal. App. 2d 680, 3 Cal. Rptr. 267 (1960).

8. CAL. CIV. PROC. CODE § 2017(b). Information concerning the insurance agreement is not, by reason of disclosure, admissible in evidence at trial. *Id.*

9. 1984 Cal. Stat. ch. 1127, sec. 1, at _____ (amending CAL. CIV. PROC. CODE § 2016(h)).

10. *See* CAL. CIV. PROC. CODE § 2018(a); REPORTER'S NOTES, *supra* note 2, at 6 (general policy for protection of opponent's work product).

that applied to each party, and to each party's attorney, is expressly extended by Chapter 1334 to each party's insurer, consultant, surety, indemnitor, and agent.¹¹

Prior statutory law was silent regarding whether the requirement of showing unfair prejudice and injustice to vitiate the work product protection should be more strict when a party seeks to discover the identity and opinions of an opponent's expert consultants prior to their designation as trial witnesses.¹² Codifying the stricter requirement imposed by existing case law, Chapter 1334 provides that information regarding the identity and facts observed by an opponent's expert consultants prior to their designation as trial witnesses may be discoverable only by (1) a showing of exceptional circumstances under which obtaining those facts by other means is impracticable for the party seeking discovery, or (2) an exchange of medical reports that a party has the right to obtain by submitting to a discovery medical examination, or by an exchange of other medical reports when the party complying with the demand for medical reports has the reciprocal right to any other reports of the examinee's condition.¹³

III. MECHANICS OF DISCOVERY

A. Methods For Discovery and Restrictions

Under Chapter 1334, any party may obtain discovery by one or more of the following methods: (1) oral and written depositions; (2) interrogatories to a party; (3) inspections of documents, things, and places; (4) physical and mental examinations; (5) requests for admissions; and (6) simultaneous exchanges of expert trial witness information.¹⁴ Chapter 1334 provides that these methods may be used in

11. CAL. CIV. PROC. CODE § 2018(a). See REPORTER'S NOTES, *supra* note 2, at 6 (general policy for protection of opponent's work product).

12. See REPORTER'S NOTES, *supra* note 2, at 7 (expert consultant's identity and information).

13. See CAL. CIV. PROC. CODE § 2018(c); REPORTER'S NOTES, *supra* note 2, at 7 (expert consultant's identity and information). See also CAL. CIV. PROC. CODE § 2032(h) (demand for medical examination report); *id.* § 2032(j) (reciprocal rights to reports). See, e.g., *Grand Lake Drive-In v. Superior Court*, 179 Cal. App. 2d 122, 131, 3 Cal. Rptr. 621, 628 (1960); *Swartzman v. Superior Court*, 231 Cal. App. 2d 195, 203-04, 41 Cal. Rptr. 721, 726-27 (1964); *Dow Chemical Co. v. Superior Court*, 2 Cal. App. 3d 1, 9, 82 Cal. Rptr. 288, 294 (1969); *Sanders v. Superior Court*, 34 Cal. App. 3d 270, 278-79, 109 Cal. Rptr. 770, 776-77 (1973).

14. CAL. CIV. PROC. CODE § 2019(a). "The listing of six discovery devices instead of five is in line with the Commission's perception that the exchange of expert trial witness information

any sequence, and the fact that a party is conducting discovery, whether by deposition or another method, cannot operate to delay the discovery of any other party.¹⁵ Chapter 1334 also restricts discovery by providing that no party is permitted to combine, in a single document, requests for admissions with any other method of discovery.¹⁶

B. Discovery from a Nonparty—Deposition Subpoena

Under prior law, provisions governing discovery from a nonparty were scattered throughout various parts of the Code of Civil Procedure and existing provisions of the Evidence Code.¹⁷ Chapter 1334 not only enacts provisions that comprehensively regulate deposition subpoenas, but also melds with other relevant and lengthy nondiscovery provisions which prompted the need for cross-referencing.¹⁸

1. Deposition Subpoena for Testimony

Under existing law, a subpoena must specify the time and place where the deponent is required to attend the deposition.¹⁹ Under Chapter 1334, a deposition subpoena compelling attendance and testimony must also include a summary of (1) the nature of a deposition; (2) the rights and duties of the deponent; (3) the penalties for disobedience of a deposition subpoena; and (4) a statement that the deposition will be video taped, if the deposition will be recorded in that manner.²⁰

provided for in [Code of Civil Procedure § 2034] is the functional equivalent of a discovery mechanism.” REPORTER’S NOTES, *supra* note 2, at 9 (methods of discovery).

15. CAL. CIV. PROC. CODE § 2019(d) (unless there is a rule of the Judicial Council, or a local court rule or local uniform written policy to the contrary). Upon motion and for good cause shown, the court may establish the sequence and timing of discovery for the convenience of parties and witnesses, and in the interest of justice. *Id.* “[T]he Commission aims to end any notion that a party who first serves deposition notices thereby acquires the power to delay an adversary’s discovery until those depositions are concluded.” REPORTER’S NOTES, *supra* note 2, at 9 (sequencing and timing of discovery).

16. CAL. CIV. PROC. CODE § 2019(c). “The Commission concluded that the mixing of methods of discovery is more productive of confusion than of efficiency. Specifically, it decided that the practice of combining interrogatories with requests for admission is undesirable.” REPORTER’S NOTES, *supra* note 2, at 9 (prohibition against combining methods).

17. REPORTER’S NOTES, *supra* note 2, at 14 (introduction to notes on deposition subpoena). See also CAL. CIV. PROC. CODE §§ 1985-1997 (means of production); CAL. EVID. CODE §§ 1560-1566 (production of hospital records).

18. See REPORTER’S NOTES, *supra* note 2, at 14 (introduction to notes on deposition subpoena).

19. CAL. CIV. PROC. CODE § 1985.

20. *Id.* § 2020(c). “[This provision] embodies the Commission’s decision that a deposition subpoena compelling attendance and testimony should convey to the recipient a clear statement

2. Deposition Subpoena for Production of Business Records

Existing law requires a deposition subpoena for production of records to be accompanied by an affidavit showing good cause for the production.²¹ Chapter 1334 dispenses with this requirement.²² Existing law also requires the date of production of business and personal records to be fifteen days after issuance of the deposition subpoena.²³ Chapter 1334 now provides that compliance with either of these types of subpoenas must be within twenty days of issuance, or within fifteen days after the service of the deposition subpoena, whichever date is later.²⁴

Chapter 1334 provides that the deposition officer for a deposition seeking only discovery of business records for copying must be a professional photocopier.²⁵ The professional photocopier must not be financially interested in the action, or be a relative or employee of any attorney of one of the parties.²⁶ Chapter 1334 further provides that the custodian of the records, or other qualified person, must

of the obligations the subpoena imposes and the consequences of disobedience of those obligations.” REPORTER’S NOTES, *supra* note 2, at 14 (deposition subpoena for testimony).

21. CAL. CIV. PROC. CODE § 1985 (records means any books, documents, or other things under the control of the deposed witness).

22. See *id.* § 2020(d). “The Commission decided that such an affidavit is a piece of redtape that serves no real purpose. Although it is beyond its charge, the Commission recommends that the requirement of a supporting affidavit be eliminated for a trial subpoena duces tecum as well.” REPORTER’S NOTES, *supra* note 2, at 15 (deposition subpoena for production of business records).

23. CAL. EVID. CODE § 1560 (production of business records); CAL. CIV. PROC. CODE § 1985.3 (production of personal records).

24. CAL. CIV. PROC. CODE § 2020(d)(1).

This subdivision makes a slight change with respect to the date for compliance with the subpoena. Where a subpoena compels production of “personal records” as defined in [Code of Civil Procedure § 1985.3(a)(1)], [Code of Civil Procedure § 1985.3(b)] presently allows the date of production to be 15 days after issuance of the subpoena. However, a “consumer” is entitled to 15 days notice of the subpoena if the notice is served on the consumer by mail, as it usually would be. Thus, the date of production is the same as the last day for the consumer to seek a protective order. On the other hand, [Evidence Code] § 1560 requires compliance with a records-only subpoena within 15 days after it is received by the custodian. [Code of Civil Procedure § 2020(d)(1)] sets the date for production as 20 days after *issuance* of the subpoena, or 15 days after *receipt* of the subpoena, whichever is *later*. The Commission believes that this is a more coherent and understandable timetable.

REPORTER’S NOTES, *supra* note 2, at 15 (deposition subpoena for production of business records).

25. CAL. CIV. PROC. CODE § 2020(d)(3) (professional photocopiers are governed by Business and Professions Code §§ 22450-22463). Any objection to the qualifications of the professional photocopies is waived unless made before the date of production or as soon thereafter as the ground for that objection becomes known or could be discovered by reasonable diligence. *Id.*

26. *Id.*

deliver²⁷ the copies²⁸ of the records and an affidavit of their authenticity²⁹ only to the deposition officer.³⁰

3. *Deposition Subpoena for Testimony and Production*

In accordance with provisions governing a deposition subpoena compelling only the production of business records, a deposition subpoena for testimony and production under Chapter 1334 does not need to be accompanied by an affidavit showing good cause for production.³¹

4. *Service of Deposition Subpoena and Witness Fee*

Under existing law, service of a subpoena must include a mileage and witness fee only if demanded by the subpoenaed party.³² Under Chapter 1334, service of a deposition subpoena that does not require the personal attendance of a custodian of records or other qualified person, must be accompanied with such fees, whether or not the fees are demanded by the deponent.³³

C. *Oral Depositions in California*³⁴

1. *Contents of Deposition Notice*

Chapter 1334 incorporates provisions of prior law requiring a party that desires to take the oral deposition of any person to notify that

27. Delivery must be made in person, by messenger, or by mail. *Id.* § 2020(d)(4).

28. Copies of the records must be true, legible, and durable. *Id.*

29. Affidavit is pursuant to Evidence Code § 1561. *Id.* § 2020(d).

30. *Id.*

[T]his subdivision is based on Evidence Code § 1560, and is largely a restatement of its requirements in a discovery setting. It seeks to emphasize the present requirement that the copies are to be delivered to the deposition officer and not directly to the party issuing the deposition subpoena. The Commission was informed that many attorneys are obtaining delivery of the records, opening the sealed envelope, removing the records, and then cancelling the deposition. This is an undesirable practice, and in particular situations could result in serious injustice.

REPORTER'S NOTES, *supra* note 2, at 15 (deposition subpoena for production of business records).

31. See CAL. CIV. PROC. CODE § 2020(e); *supra* note 22 and accompanying text.

32. CAL. CIV. PROC. CODE § 1987.

33. *Id.* § 2020(f) (payment must be in cash or by check in accordance with Evidence Code § 1563(b)(6)).

34. As a practical matter, over 95 percent of the depositions taken under [prior law had] four features: (1) the examination [was] conducted by oral questioning; (2) the deposition [was] taken during the pendency of the action; (3) the lawsuit [was] a California one; and (4) the deposition [was] taken within the borders of this

person, and every other party to the action, in writing.³⁵ Chapter 1334 now provides that if the attendance of the deponent is to be compelled by service of a deposition subpoena, an identical copy of that subpoena must be served with the deposition notice.³⁶

Under prior law, if a party deposed an organization,³⁷ the organization was required to designate one or more officers, directors, or managing agents, to testify on the organization's behalf.³⁸ Chapter 1334 provides that the one or more persons designated by the organization must now be *the most qualified* to testify as to the matters described in the deposition notice.³⁹ Furthermore, Chapter 1334 extends the list of persons who must be designated to include an organization's employees and agents.⁴⁰

2. Place of Deposition

As enacted, Chapter 1334 incorporates prior law by requiring the deposition of a natural person to be taken at a place that is (1) within 75 miles of the deponent's residence, or (2) within 150 miles of the deponent's residence if the place of the deposition is in the

state. As the Discovery Act [was] structured, the provisions governing this common type of deposition [were] located in five statutes: [1984 Cal. Stat. ch. 1127, sec. 1, at _____(amending CAL. CIV. PROC. CODE § 2016); 1961 Cal. Stat. ch. 192, sec. 1, at 1194 (amending CAL. CIV. PROC. CODE § 2018); 1985 Cal. Stat. ch. 444, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2019); 1961 Cal. Stat. ch. 192, sec. 3, at 1198 (amending CAL. CIV. PROC. CODE § 2021); 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034)].

[Code of Civil Procedure § 2025] reflects the conclusion of the Discovery Commission that, to the extent feasible, the provisions governing this preponderant type of deposition are better situated in a single, comprehensive statute. This statute may then be used as the hub for the procedures to be followed when it is necessary to take the more unusual types of deposition.

REPORTER'S NOTES, *supra* note 2, at 40 (introduction to oral depositions in California).

35. CAL. CIV. PROC. CODE § 2025(c); 1985 Cal. Stat. ch. 444, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2019(a)(1)). See CAL. CIV. PROC. CODE § 2025(d) (contents of deposition notice).

36. CAL. CIV. PROC. CODE § 2025(d).

37. Organization means a public or private corporation, partnership, association, or government agency. 1985 Cal. Stat. ch. 444, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2019(a)(6)). Organization has the same definition in Chapter 1334. See CAL. CIV. PROC. CODE § 2025(a).

38. 1985 Cal. Stat. ch. 444, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2019(a)(6)). Prior law permitted any other person of the organization to consent to testify on the organization's behalf. *Id.* Chapter 1334 deletes this provision. Compare CAL. CIV. PROC. CODE § 2025(d) with 1985 Cal. Stat. ch. 444, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2019(a)(6)).

39. CAL. CIV. PROC. CODE § 2025(d).

40. *Id.*

forum county.⁴¹ This latter distance restriction, however, was incorrectly written into Chapter 1334, and clean-up legislation proposed for the next legislative session intends to reduce this limitation regarding depositions within the forum county from 150 miles to 75 miles.⁴²

3. *Defective Notice of Deposition*

Prior law stated that all errors and irregularities in the deposition notice were waived unless a written objection was promptly served upon the party that issued the notice.⁴³ Chapter 1334 reenacts prior law and expands on this provision by providing that a written objection cannot be served on the party issuing the deposition notice less than three calendar days before the date for which the deposition is scheduled.⁴⁴

4. *Compelling Deponent's Attendance—Party or Party-Affiliated Deponent*

Under prior law, proper service of a deposition notice, without a deposition subpoena, was effective to require the attendance and testimony of a party or anyone who, at the time of taking the deposition, would be the party's officer, director, or managing agent.⁴⁵ Chapter 1334 reenacts prior law and includes a party's employee as a person whose attendance and testimony may be required by proper service of a deposition notice.⁴⁶ Under prior law, valid service of a

41. Compare CAL. CIV. PROC. CODE § 2025(e)(1) with 1985 Cal. Stat. ch. 444, sec. 2, at _____ (amending CAL. CIV. PROC. CODE § 2019(a)(2)). The deposition of an organization that is a party to the action must be taken at a place that is, at the option of the party giving notice of the deposition, either within 75 miles of the organization's principal executive business office in California, or in the county where the action is pending and within 150 miles of the office. CAL. CIV. PROC. CODE § 2025(e)(2).

42. See *supra* note 3. This change is also intended for provisions governing place of depositions for organizations. *Id.* "[T]he Commission does not believe county boundaries are significant in fixing a deposition site" REPORTER'S NOTES, *supra* note 2, at 41 (place of deposition).

43. 1961 Cal. Stat. ch. 192, sec. 3, at 1198 (amending CAL. CIV. PROC. CODE § 2021(a)).

44. See CAL. CIV. PROC. CODE § 2025(g). Written objections must also be served on any other attorney or party on whom the deposition notice was served. If an objection is made three calendar days before the deposition date, the objecting party must make personal service of that objection on the party who gave notice of the deposition. *Id.* See also REPORTER'S NOTES, *supra* note 2, at 42 (defective notice of deposition).

45. 1985 Cal. Stat. ch. 444, sec. 2, at _____ (amending CAL. CIV. PROC. CODE § 2019(a)(4)).

46. CAL. CIV. PROC. CODE § 2025(h)(1).

deposition notice was also effective to require the attendance and testimony of a person for whose immediate benefit an action or proceeding was prosecuted or defended.⁴⁷ Chapter 1334 deletes this provision.⁴⁸

5. Failure to Attend

Under prior law, the trial court could impose various sanctions on a party, a person immediately benefitting from the action, or a party's officer, director, or managing agent, for an initial failure to appear at a deposition, if the court found that the failure was willful.⁴⁹ For an initial failure to appear, Chapter 1334 now provides that a court may impose only monetary sanctions on a party, a party's officer, director, managing agent, or employee, or a person designated on behalf of an organization.⁵⁰

6. Conduct of Deposition

Prior law permitted deposition testimony to be recorded by video

47. 1985 Cal. Stat. ch. 444, sec. 2, at ____ (amending CAL. CIV. PROC. CODE § 2019(a)(4)).

48. CAL. CIV. PROC. CODE § 2025(h).

A review of the appellate cases that have had occasion to interpret this provision has convinced the Commission that little is achieved by encumbering the Discovery Act with this language permitting such special treatment for an "immediate beneficiary." In *Waters v. Superior Court* [58 Cal. 2d 885, 897, 377 P.2d 265, 271-72, 27 Cal. Rptr. 153, 159-60 (1962)], for example, the Supreme Court declined to find that Howard Hughes was an "immediate beneficiary" of a corporation of which he was the sole shareholder. To be sure, in *Hand v. Superior Court* [134 Cal. App. 3d 436, 184 Cal. Rptr. 588 (1982)], it was held that at least where a marriage is still intact, the community property interest that one spouse has in the other spouse's claim for personal injuries requires a non-party spouse to submit to a deposition without the need for a subpoena. The Commission believes that this minor convenience does not warrant retention of the "immediate beneficiary" provision.

REPORTER'S NOTES, *supra* note 2, at 43 (compelling deponent's attendance—party or party affiliated deponent).

49. 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034(d)) (various sanctions include striking out all or any part of any pleading of that party, dismissing the action or proceeding or any part thereof, entering a judgment by default against that person, or imposing other penalties of a lesser nature the court may deem just); REPORTER'S NOTES, *supra* note 2, at 44 (failure to attend deposition).

50. CAL. CIV. PROC. CODE § 2025(j)(3).

The Commission believes that [prior law] needlessly create[d] issues as to what constitute[d] "willfulness," and that in practice most courts [were] reluctant to impose such a severe sanction for a mere failure to respond. Indeed, the trial court [was] courting reversal on the ground of abuse of discretion if it [did] exercise this power.

REPORTER'S NOTES, *supra* note 2, at 44 (failure to attend). See also *Crummer v. Beeler*, 185 Cal. App. 2d 851, 858-60, 8 Cal. Rptr. 698, 702-04 (1960) (exercise of power to impose sanctions under prior law raised issues of reversal for abuse of discretion).

tape.⁵¹ Chapter 1334 permits a party to record a deposition by means of audio tape as well as video tape if the deposition notice stated an intention to record by either of these means, or if all parties consented to recording the testimony by audio tape or video tape.⁵² With the enactment of Chapter 1334, any other party intending to make a simultaneous audio tape or video tape record of the deposition must serve written notice, at least three calendar days before the deposition date, on the party or attorney who notices the deposition, and on all other parties or attorneys who were served the deposition notice.⁵³

Chapter 1334 permits the operator of the recording equipment to be an employee of the attorney taking the deposition, unless the operator is also the deposition officer.⁵⁴ Chapter 1334, however, provides that, if a video tape of a deposition is to be offered at trial or any other hearing, the operator of the recording equipment must be authorized to administer an oath, and must not be financially interested in the action or be a relative or employee of any attorney of any of the parties, unless all parties attending the deposition waive these qualifications and restrictions.⁵⁵

Chapter 1334 provides that the original audio tape or video tape must be preserved unaltered.⁵⁶ In addition, a deposition that is to be offered at a trial or any other hearing that is recorded by audio tape or video tape must be accompanied by a stenographic transcript prepared from the recording.⁵⁷

7. Objections

Prior law provided that objections to the competency of a witness or to the competency, relevancy, or materiality of testimony were not waived by failure to make the objections before or during the taking of the deposition.⁵⁸ Prior law, however, was silent regarding

51. 1985 Cal. Stat. ch. 444, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2019(c)). Prior law provided that to record a deposition by video tape (1) the deposition notice was required to state that the deposition would be made in such a manner, or (2) all parties had to agree to the use of video tape to record the deposition. *Id.*

52. CAL. CIV. PROC. CODE § 2025(l)(1).

53. *Id.*

54. *Id.* § 2025(l)(2)(B).

55. *Id.* (waiver must be on the record). See generally *id.* § 2025(l)(2)(A)-(H) (procedures to be observed during a video tape or audio tape deposition).

56. *Id.* § 2025(l)(2)(I).

57. *Id.*

58. 1961 Cal. Stat. ch. 192, sec. 3, at 1198 (amending CAL. CIV. PROC. CODE § 2021(c)(1)) (unless the ground of the objection could have been obviated or removed if presented at that time).

privilege or work product objections.⁵⁹ Chapter 1334 specifically states that privileged information, including information protected by the work product privilege, is waived unless a specific objection to the disclosure of the information is timely made during the deposition.⁶⁰

8. *Motion to Compel Answers or Production*

Under prior law, a proponent seeking to compel answers or production of records was permitted to make the motion in the county where the deposition was taken, if the court in which the action was pending did not have jurisdiction over the deponent.⁶¹ Chapter 1334 provides that this motion may be made only in the court in which the action is pending.⁶² Chapter 1334 also places a sixty-day limit on the period during which these motions may be made.⁶³ Prior law provided that the proponent of the motion must lodge with the court the original deposition transcript.⁶⁴ Chapter 1334 specifies that a certified copy of only the parts of the transcript relevant to the motion must be filed with the court.⁶⁵

9. *Limitation on Number of Depositions and Subsequent Depositions*

Prior law contained no provisions specifically limiting the number of times a person could be deposed.⁶⁶ Chapter 1334 provides that once a party has taken the deposition of any natural person, including that of a party to the action, neither the party who gave nor any other party who received notice of the deposition may take a sub-

59. See *id.* See also CAL. EVID. CODE § 912(a) (provides that a privilege is waived by a failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege). "Since the work product protection is in many ways analogous to a privilege, failure to invoke it should also result in a waiver." REPORTER'S NOTES, *supra* note 2, at 45 (privilege or work product).

60. CAL. CIV. PROC. CODE § 2025(m)(1).

61. 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034(a)).

62. See CAL. CIV. PROC. CODE § 2025(o).

63. *Id.*

64. 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034(a)).

65. CAL. CIV. PROC. CODE § 2025(o).

[N]ow that the courts have state-wide subpoena power in civil cases, the Commission believes that it is no longer necessary or appropriate for a court other than the one in which the action is pending to rule on a motion for a protective order terminating or limiting the scope of a deposition.

REPORTER'S NOTES, *supra* note 2, at 45 (suspension of deposition).

66. See 1984 Cal. Stat. ch. 1127, sec. 1, at _____ (amending CAL. CIV. PROC. CODE § 2016); REPORTER'S NOTES, *supra* note 2, at 47 (subsequent deposition).

sequent deposition of that deponent.⁶⁷ If good cause is shown, the court may grant leave to take a subsequent deposition.⁶⁸ Moreover, the parties, with the consent of any deponent who is not a party, may stipulate that a subsequent deposition be taken.⁶⁹

10. Use of a Video Tape Deposition of an Expert

Under prior law, a party could use a deposition in court only if (1) specified circumstances deemed the deponent unavailable as a witness,⁷⁰ (2) exceptional circumstances existed to make the use of the deposition desirable in the interest of justice, or (3) the deponent resided more than 150 miles from the trial or hearing.⁷¹ Chapter 1334 substantially incorporates the same provisions as prior law but further provides that a party may use in court a video tape deposition of a treating or consulting physician, or of any expert witness, even though the deponent is available to testify, if the deposition notice stated that the deposition was intended for this use at trial.⁷²

D. Written Depositions

1. Objections to Written Depositions

Prior law contained no provisions specifically governing objections to questions in a written deposition.⁷³ Chapter 1334 requires a party

67. CAL. CIV. PROC. CODE § 2025(t).

[This limitation on the number of times a deponent may be deposed] reflects the Commission's decision that in order to minimize the demands that depositions make on the time and energy of the deponent, a person should normally be subjected to the experience only once during the course of a lawsuit.

REPORTER'S NOTES, *supra* note 2, at 47 (subsequent deposition).

68. CAL. CIV. PROC. CODE § 2025(t).

69. *Id.* This subdivision does not preclude taking one subsequent deposition of a natural person who has previously been examined as a result of that person's designation to testify on behalf of an organization. *Id.*

70. Specified circumstances are listed in Evidence Code § 240. *See also* CAL. CIV. PROC. CODE § 2025(u)(3)(B) (language of Evidence Code § 240 modified and incorporated into Chapter 1332).

71. 1984 Cal. Stat. ch. 1127, sec. 1, at _____(amending CAL. CIV. PROC. CODE § 2016(d)(3)).

72. CAL. CIV. PROC. CODE § 2025(u)(4).

This [provision] makes a major change with respect to use of videotaped depositions of doctors and other experts This provision should go a long way towards reducing both the costs of litigation and the disruption of the practice of doctors and other experts that are side effects of the present system.

REPORTER'S NOTES, *supra* note 2, at 47-48 (videotape deposition of expert).

73. *See* 1963 Cal. Stat. ch. 519, sec. 2, at 1401 (amending CAL. CIV. PROC. CODE § 2020); REPORTER'S NOTES, *supra* note 2, at 57 (objections to written depositions). "The Commission

that objects to the form of any question in a written deposition to serve a specific objection on all parties entitled to notice of the deposition, within fifteen days after being served the questions, or that party will be deemed to have waived the objections.⁷⁴ An objecting party that serves a timely objection may promptly move the court to sustain the objection, but the burden of obtaining a court ruling on the objection differs depending on the nature of the objection.⁷⁵ If a party objects to the form of a question, that party has the burden of obtaining a ruling sustaining the objection.⁷⁶ If a party objects to a question on the grounds of privilege or work product, the party seeking discovery has the burden of obtaining a ruling overruling the objection.⁷⁷

2. *Previewing of Questions by Deponent*

Prior law did not address whether a deponent had the right to preview questions for a written deposition.⁷⁸ Under Chapter 1334, while the party taking a written deposition may forward to the deponent a copy of the questions on direct examination for study prior to the deposition, a party or attorney is prohibited from permitting the deponent to preview the form or the substance of any cross, redirect, or recross questions.⁷⁹

E. *Interrogatories to a Party*

1. *Limitation on Number of Interrogatories*

Prior law did not limit the number of interrogatories or sets of interrogatories that were relevant to the subject matter of the pending action, except as justice required to protect a party from annoyance,

decided that the manner of making objections and obtaining a ruling on them requires special treatment where the deposition is being taken by written questions.” REPORTER’S NOTES, *supra* note 2, at 57 (objections to written depositions).

74. CAL. CIV. PROC. CODE § 2028(d)(1).

75. *Id.* § 2028(d)(1), (2).

76. *Id.* § 2028(d)(1).

77. *Id.* § 2028(d)(2).

78. REPORTER’S NOTES, *supra* note 2, at 57 (previewing of questions by deponent). See 1963 Cal. Stat. ch. 519, sec. 2, at 1401 (amending CAL. CIV. PROC. CODE § 2020).

79. CAL. CIV. PROC. CODE § 2028(e). “In a number of reported federal cases, issues have arisen as to the propriety of permitting a deponent to preview the questions, and the decisions are in conflict. The Commission believes that the propriety of such previewing should be articulated.” REPORTER’S NOTES, *supra* note 2, at 57 (previewing of questions by deponent).

expense, embarrassment, or oppression.⁸⁰ With the enactment of Chapter 1334, no party, as a matter of right, may propound to any other party more than thirty-five interrogatories, unless the number has been increased by stipulation or court order.⁸¹ Chapter 1334 further provides that (1) *each* interrogatory must be full and complete; (2) an interrogatory must not contain subparts, or a compound, conjunctive, or disjunctive question; and (3) no preface or instructions may be included with a set of interrogatories unless approved by rules and forms to be developed by the Judicial Council.⁸² If the initial set of interrogatories does not exhaust the statutory limit, the

80. 1983 Cal. Stat. ch. 141, sec. 1, at ____ (amending CAL. CIV. PROC. CODE § 2030(c)).

81. CAL. CIV. PROC. CODE § 2030(c)(1).

In proposing this presumptive limit on the number of interrogatories, the Discovery Commission is addressing a concern that is well expressed in the following passage from *Deyo v. Kilbourne* [84 Cal. App. 3d 771, 780-81, 149 Cal. Rptr. 499, 507-08 (1978)]: "Lengthy interrogatories suitable to major litigation are often needlessly used in small cases. Questions are often repetitious or wholly irrelevant. While our discovery laws are designed to prevent trial by ambush, the most common cry from lawyers is that they are being 'papered to death.'"

The Commission's recommendation of a presumptive limit on interrogatories is not a novel solution to the abuse created by the reflexive filing of unnecessarily voluminous interrogatories. Rule 8.2.1 of the United States District Court for the Central District of California sets a presumptive limit of 30 interrogatories including sub-parts. Rule 230-1 of the United States District Court for the Southern District of California, while more liberal with regard to interrogatories containing subparagraphs, establishes a presumptive limit of 25. Maryland has long limited the number of interrogatories to 30. Md. Rule 2-421(a). Massachusetts, adopting rules of civil procedure in 1973 based on the federal model, modified them to continue its long-existing practice of limiting the number of interrogatories to 30. Rule 33 of Mass. Rules of Civil Procedure. In 1977, the Special Committee for the Study of Discovery Abuse of the ABA's Section of Litigation urged unsuccessfully that [Federal Rule of Civil Procedure] 33 be amended to limit interrogatories to 30. Its report stated: "No single rule was perceived by the Bar at large responding to the Committee's questionnaire as engendering more discovery abuse than Rule 33 on interrogatories. Numerous solutions to perceived problems were considered. In the final analysis the Commission determined that an initial numerical limitation on interrogatories filed as a matter of right was the soundest approach to limiting interrogatory abuse and to enhancing better use of interrogatories as a discovery mechanism."

REPORTER'S NOTES, *supra* note 2, at 67 (number of interrogatories).

82. CAL. CIV. PROC. CODE § 2030(c)(5). *See id.* § 2033.5 (provisions authorizing Judicial Council to develop rules and forms for interrogatories and requests for admission and procedures to be followed). *See also* CAL. CONST. art. 6, § 6 (provisions creating and governing Judicial Council). Any term specially defined in a set of interrogatories must be typed with all letters capitalized whenever that term appears. CAL. CIV. PROC. CODE § 2030(c)(5).

This provision is included to prevent wrangling about whether a party is evading the 35-question limit by using prefaces, instructions, definitions, and sub-parts to exceed the substance of the restriction it imposes. The Commission does not believe that boilerplate interrogatories, prefaces, instructions, definitions, or sub-parts are *per se* abusive. Instead, it recognizes the need to control use of these devices lest they become the vehicle for evasion of the 35-question limit.

REPORTER'S NOTES, *supra* note 2, at 68 (prefaces, instructions, definitions, and subparts).

balance may be propounded in subsequent sets.⁸³ Any particular interrogatory that exceeds the statutory limit need not be answered if the responding party states an objection⁸⁴ to the interrogatory.⁸⁵

2. Additional Interrogatories

Under Chapter 1334, any party may propound a greater number of interrogatories to another party if this greater number is warranted by any of the following: (1) the complexity or quantity of the existing and potential issues in the particular case; (2) the financial burden on a party entailed in conducting the discovery by oral deposition; or (3) the expedience of using this method of discovery to provide the responding party with the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought.⁸⁶ Any party who is propounding or has propounded more than thirty-five interrogatories to any other party must attach to each set of interrogatories a Declaration For Additional Discovery.⁸⁷ The Declaration contains, in pertinent part, statements, signed under penalty of perjury, that (1) the party propounding the interrogatories is familiar with the issues and previous discovery conducted by all parties, (2) the information sought by each question and any subpart is necessary for the proper preparation of the case and reasonably requires this number of questions, and (3) none of the questions or subparts are being propounded for any purpose, such as to harass the party, or the party's attorney, receiving the questions, or to cause unnecessary delay or needless increase in the cost of litigation.⁸⁸

83. CAL. CIV. PROC. CODE § 2030(c)(1).

84. Objection must be made in accordance with Code of Civil Procedure § 2030(f)(3) (provisions governing objections to interrogatories). *Id.* § 2030(c)(1).

85. *Id.*

86. *Id.* § 2030(c)(2).

The Commission is aware that in many lawsuits the limit of interrogatories to 35 is totally inappropriate. It does not want to see [the] presumptive limit result in the atrophy of this important discovery mechanism in cases where voluminous interrogatories are justified. It is the expectation of the Commission that in many such cases the mutual need for resort to this method of discovery on a broader scale will induce counsel for the respective parties to stipulate away this presumptive limit, or least to agree to a greater number.

REPORTER'S NOTES, *supra* note 2, at 67-68 (additional interrogatories).

87. CAL. CIV. PROC. CODE § 2030(c)(3).

88. *Id.* The declaration must also contain substantially the following: (1) the name of the person seeking additional discovery; (2) the party on whose behalf the additional discovery is sought; (3) the name of the party from whom discovery is sought; (4) a statement that the interrogatories will exceed the statutory limit; (5) the number of previously propounded interrogatories (including subparts); (6) a statement that the interrogating party has personally

3. Continuing Interrogatories

Prior law was silent regarding whether a party could specify that an interrogatory was continuing.⁸⁹ Chapter 1334 prohibits a continuing interrogatory that imposes a duty on the responding party to supplement an answer by information acquired later.⁹⁰

4. Supplemental Interrogatories

Chapter 1334 provides that in addition to the statutory limit of thirty-five interrogatories and warranted additional interrogatories, a party may propound supplemental interrogatories to elicit any later-acquired information bearing on all answers previously made by any party in response to interrogatories.⁹¹ Chapter 1334 permits supplemental interrogatories to be propounded (1) twice prior to the initial setting of a trial date, and (2) once after each setting of a trial date, but subject to the time limitations of Chapter 1334 regarding discovery immediately preceding trial.⁹²

5. Response to Interrogatories—Signature and Oath

Prior law required the responding party to sign the response to interrogatories under oath.⁹³ Chapter 1334 incorporates this require-

examined each of the questions, including any subparts, in the set of interrogatories; (7) a declaration, under penalty of perjury under the laws of California, that the foregoing is true and correct; and (8) a signature of the attorney propounding the interrogatories. *Id.*

89. REPORTER'S NOTES, *supra* note 2, at 69 (continuing interrogatories). See 1983 Cal. Stat. ch. 141, sec. 1, at _____ (amending CAL. CIV. PROC. CODE § 2030).

The propriety of specifying that interrogatories are "continuing" so as to impose on the responding party a duty to supplement them by later acquired information has been described as "apparently an open question" in California discovery practice. *Rangel v. Graybar Electric Co.* [70 Cal. App. 3d 943, 950 n.6, 139 Cal. Rptr. 191, 195 n.6 (1977)]. The Commission believes that this matter should be settled one way or the other. It fears that imposition of a duty to supplement on the responding party opens the door to the possibility of evidentiary hearings, both before and during the trial, to determine just when new information came into the possession of an opponent. It also concluded that it is burdensome on the responding party to be required periodically to review the previous answers. Accordingly, it is proposing that "continuing" interrogatories be outlawed. This prohibition, however, is tempered by the provisions of [Code of Civil Procedure § 2030(c)(8)], which permits the propounding party to serve a limited number of supplemental interrogatories designed to bring about an update of the previous answers.

REPORTER'S NOTES, *supra* note 2, at 69 (continuing interrogatories).

90. CAL. CIV. PROC. CODE § 2030(c)(7).

91. *Id.* § 2030(c)(8) (on motion, for good cause shown, the court may grant leave for a party to propound an additional number of supplemental interrogatories).

92. *Id.* See also *id.* § 2024 (limitations on discovery immediately preceding trial).

93. 1983 Cal. Stat. ch. 141, sec. 1, at _____ (amending CAL. CIV. PROC. CODE § 2030(a)).

ment but also provides that if the officer or agent⁹⁴ signing the response on behalf of that party is an attorney, that party waives any lawyer-client privilege and any work product protection during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.⁹⁵

6. Failure to Serve Responses

Chapter 1334 eliminates the power of the trial court to impose severe sanctions⁹⁶ for an initial, willful failure to answer interrogatories.⁹⁷ Instead, the court may impose only monetary sanctions unless a party fails to obey an order compelling further response to interrogatories, at which time the court may impose severe sanctions.⁹⁸

7. Use of Answers to Interrogatories

Existing case law restricts the use of interrogatories at trial or any other hearing to the extent permitted by the rules of evidence.⁹⁹ Chapter 1334 codifies this restriction but additionally provides that

94. An officer or agent may sign on behalf of a party that is a public or private corporation, partnership, association, or government agency. CAL. CIV. PROC. CODE § 2030(g).

95. *Id.*

Frequently, the one signing on behalf of an organization is either the attorney of the party in the action or someone on the organization's legal staff. This practice invites assertion of the lawyer-client privilege and the work product protection when the propounding party seeks to learn the sources of the information used in making the answer. The Commission concluded that it should be made clear that neither this privilege nor the work product protection may be claimed when that party tries to explore the sources of the information used by the attorney in preparing the response.

REPORTER'S NOTES, *supra* note 2, at 71 (signature and oath).

96. Severe sanctions means an issue sanction, an evidence sanction, or a terminating sanction under Code of Civil Procedure § 2023. CAL. CIV. PROC. CODE § 2030(l).

97. See REPORTER'S NOTES, *supra* note 2, at 71-72 (failure to serve response). Compare CAL. CIV. PROC. CODE § 2030(k) with 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034(d) (failure to appear or serve answers)).

The Commission believes that [prior law] needlessly create[d] issues as to what constitute[d] "willfulness," and that in practice most courts [were] reluctant to impose such a severe sanction for a mere failure to respond. Indeed, the trial court [was] courting reversal on the ground of abuse of discretion if it [did] exercise this power.

REPORTER'S NOTES, *supra* note 2, at 72 (failure to serve response).

98. CAL. CIV. PROC. CODE § 2030(k).

99. REPORTER'S NOTES, *supra* at 72-73 (use of answers to interrogatories). See, e.g., *Castaline v. Los Angeles*, 47 Cal. App. 3d 580, 121 Cal. Rptr. 786 (1975); *Rimmele v. Northridge Hospital Foundation*, 46 Cal. App. 3d 123, 120 Cal. Rptr. 39 (1975); *Giesler v. Berman*, 6 Cal. App. 3d 919, 86 Cal. Rptr. 205 (1970); *Estate of Horman*, 265 Cal. App. 2d 796, 71 Cal. Rptr. 780 (1968); *Associates Discount Corp. v. Tobb Co.*, 241 Cal. App. 2d 541, 50 Cal. Rptr. 738 (1966).

the use of an answer to an interrogatory may be used only against the party supplying the answer.¹⁰⁰

F. Inspection of Documents, Tangible Things, and Places

1. Contents of Inspection Demand

Under prior law, a demanding party was required to specify a reasonable time for the inspection.¹⁰¹ Chapter 1334 provides that the date must now be within thirty days after service of the demand.¹⁰²

2. Response to Inspection Demand

Chapter 1334 provides that a response to an inspection demand must be item-by-item, or category-by-category.¹⁰³ Chapter 1334, however, eliminates the prior law requirement that a list of all documents in a particular category be supplied in the response.¹⁰⁴

Under prior law, response to an inspection demand was permitted in only two forms: (1) a statement that inspection is permitted, or (2) an objection to the inspection.¹⁰⁵ Chapter 1334 adds a third response: A representation that the party lacks the ability to comply with the inspection demand for a particular item or category of items.¹⁰⁶ Under Chapter 1334, however, this third response must be accompanied by a statement specifying whether the inability to comply with the demand is because the particular item or category of item (1) has never existed; (2) has been destroyed; (3) has been lost, misplaced, or stolen; or (4) has never been, or is no longer, in the possession, custody, or control of the responding party, along with the name and address of any natural person or organization known or believed by that party to have possession, custody, or control of that item.¹⁰⁷

100. See CAL. CIV. PROC. CODE § 2030(n).

101. 1980 Cal. Stat. ch. 23, sec. 1, at 73 (amending CAL. CIV. PROC. CODE § 2031(b)).

102. CAL. CIV. PROC. CODE § 2031(c)(3).

103. See *id.* § 2031(f)(1).

104. Compare *id.* § 2031(f) with 1980 Cal. Stat. ch. 23, sec. 1, at 73 (amending CAL. CIV. PROC. CODE § 2031(b)). “The Commission believes that this requirement is needlessly burdensome to the responding party and is an unnecessary appendage to a device whose function is to achieve an inspection, not an interrogation.” REPORTER’S NOTES, *supra* note 2, at 81 (response to inspection demand).

105. 1980 Cal. Stat. ch. 23, sec. 1, at 73 (amending CAL. CIV. PROC. CODE § 2031(b)).

106. CAL. CIV. PROC. CODE § 2031(f)(1)(B).

107. *Id.* § 2031(f)(3).

3. Signature and Oath of Response

Prior law required that a response to an inspection demand be subscribed under oath.¹⁰⁸ Chapter 1334 retains this requirement but also provides that if the officer or agent¹⁰⁹ signing the response on behalf of that party is an attorney, that party waives any lawyer-client privilege and any work product protection during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.¹¹⁰

G. Physical and Mental Examinations

1. Initial Physical Examination of Personal Injury

Prior law required *all* forms of discovery by medical examination to be conducted pursuant to a court order, unless the parties otherwise stipulated.¹¹¹ With the enactment of Chapter 1336, in any case in which a plaintiff is seeking recovery for personal injuries, a defendant may demand *one* physical examination of the plaintiff, provided the examination is conducted at a location within seventy-five miles of the residence of the examinee and does not include any diagnostic test or procedure that is painful, protracted, or intrusive.¹¹² The defendant must serve a copy of the demand for this physical exam-

108. 1980 Cal. Stat. ch. 23, sec. 1, at 73 (amending CAL. CIV. PROC. CODE § 2031(b)).

109. An officer or agent may sign on behalf of a party that is a public or private corporation, partnership, association, or government agency. CAL. CIV. PROC. CODE § 2031(g).

110. *Id.* § 2031(g). See *supra* note 95 (Commission's rationale for this provision).

111. 1980 Cal. Stat. ch. 1206, sec. 1, at 4066 (amending CAL. CIV. PROC. CODE § 2032(a)); REPORTER'S NOTES, *supra* note 2, at 90 (initial physical injury examination of personal injury plaintiff).

112. CAL. CIV. PROC. CODE § 2032(c)(1). The demand must specify the time, place, manner, conditions, scope, and nature of the examination, as well as the identity and the specialty, if any, of the physician who will perform the examination. The examination must be scheduled at least 30 days after service of the demand. *Id.* § 2032(c)(2).

This provision has no counterpart in the present statute In practice this discovery method is most frequently employed to obtain a form of medical examination that a court would authorize almost as a matter of course, namely, an (1) initial (2) routine (3) physical examination of a (4) personal injury plaintiff (5) at a site near the examinee's home. Indeed, it is likely that the vast majority of such examinations are arranged by stipulation. By permitting initiation by demand instead of motion in the situation where this discovery device would most often be utilized, this provision makes this method partially self-executing, in that the burden of seeking court intervention is shifted from the one desiring such an examination to the one resisting it.

REPORTER'S NOTES, *supra* note 2, at 90 (initial physical injury examination of personal injury plaintiff).

ination on the plaintiff and on all other parties.¹¹³ The plaintiff has twenty days after service of the demand to serve the defendant and all other parties with a response.¹¹⁴ After receiving the response, the defendant may move for an order compelling compliance if the defendant deems that any modification of the demand, or any refusal to submit to the physical examination, is unwarranted.¹¹⁵

2. Court-Ordered Examinations

As stated earlier, prior law required a party seeking discovery by any physical or mental examination to obtain a court order.¹¹⁶ Notwithstanding a defendant's right to demand one physical examination of a plaintiff seeking recovery for personal injuries, Chapter 1336 reenacts the court order requirement of prior law, but differs from prior law in three respects.¹¹⁷ First, Chapter 1336 requires a motion seeking the performance of unusual, painful, protracted, dangerous, or intrusive diagnostic procedures to be accompanied by a physician's declaration explaining the necessity for those procedures, and the degree of pain or danger involved.¹¹⁸ Second, Chapter 1336 does not permit a mental examination of a person seeking recovery for personal injury except on a showing of exceptional circumstances, if the person seeking recovery for injury stipulates that (1) no claim is being made for an unusual or particularly serious component of mental and emotional distress over and above that usually associated with such physical injuries, and (2) no psychiatric testimony will be presented at trial in support of the claim for damages for this usual mental and emotional distress.¹¹⁹ Third, a place of examination that is more than seventy-five miles from the residence of the person to be examined must be approved by the court and requires the moving party to advance the costs of that travel to the examinee.¹²⁰

113. CAL. CIV. PROC. CODE § 2032(c)(3).

114. *Id.* § 2032(c)(4).

115. *Id.* § 2032(c)(5).

116. 1980 Cal. Stat. ch. 1206, sec. 1, at 4066 (amending CAL. CIV. PROC. CODE § 2032(a)).

117. REPORTER'S NOTES, *supra* note 2, at 90 (court ordered examinations).

118. CAL. CIV. PROC. CODE § 2032(d).

119. *Id.* "[T]his provision prevents a defendant from using a claim for the normal mental distress connected with a party's physical injury as the springboard for the wide-ranging invasion of privacy that a mental examination usually entails." REPORTER'S NOTES, *supra* note 2, at 90 (court ordered examinations).

120. CAL. CIV. PROC. CODE § 2032(d).

3. Conduct of Examination

During a mental examination pursuant to Chapter 1336, the mental examiner and the examinee now have the right to record the examination on audio tape.¹²¹ Nothing in Chapter 1336, however, may be construed to alter, amend, or affect existing case law with respect to the presence of counsel or other persons during the examination by agreement or court order.¹²² Chapter 1336 also enacts a new provision concerning the use of X-rays during a physical examination.¹²³ If the examinee submits or authorizes access to X-rays of any area of the body, additional X-rays of that area may be taken by the examining physician *only* with the consent of the examinee or on order of the court for good cause shown.¹²⁴

4. Demand and Reciprocal Right to Examination Report

Prior law lacked any specific time period for compliance with the demand for a copy of an examination report.¹²⁵ Chapter 1336 provides that the party upon whom a demand has been made must deliver an examination report within thirty days after service of the demand, or within fifteen days of trial, whichever is earlier.¹²⁶

H. Requests for Admission

1. Admissions Requiring an Application of Law to Fact

Prior case law states that a party served with a request for admission could not object to a request concerning a legal question

121. *Id.*

122. *Id.* See, e.g., *Edwards v. Superior Court*, 16 Cal. 3d 905, 909-12, 549 P.2d 846, 848-50, 130 Cal. Rptr. 14, 16-18 (1976) (an examinee does not have the right to counsel during a psychiatric examination for a civil action).

123. CAL. CIV. PROC. CODE § 2032(g). Compare *id.* § 2032(g) with 1980 Cal. Stat. ch. 1206, sec. 1, at 4066 (amending CAL. CIV. PROC. CODE § 2032).

124. CAL. CIV. PROC. CODE § 2032(g). "The Commission also took note of the increased awareness of the danger from X-rays, as well as their often redundant and indiscriminate use during discovery examinations." REPORTER'S NOTES, *supra* note 2, at 91 (conduct of examination).

125. REPORTER'S NOTES, *supra* note 2, at 91 (demand for report).

126. CAL. CIV. PROC. CODE § 2032(h). Nothing in this section requires the disclosure of the identity of an expert consulted in actions for professional negligence pursuant to Code of Civil Procedure §§ 411.30 or 411.35. Nothing in this section affects existing law as to the disclosure of consulting experts under the lawyer-client privilege or under the protection for work product prepared in anticipation of litigation or for trial. *Id.*

simply by asserting that the request calls for a conclusion of law.¹²⁷ In contrast, Chapter 1334 prohibits a request that requires an application of law to fact.¹²⁸

2. Limitation on Number of Requests for Admission

Prior law did not limit the number of requests for admission or sets of requests for admission regarding the genuineness of documents or the truth of any relevant matters of fact except as justice required to protect a party from annoyance, expense, embarrassment, or oppression.¹²⁹ Chapter 1334 provides that the number of requests for admission of the genuineness of documents is not limited except as justice requires to protect the responding party from annoyance, embarrassment, oppression, or undue burden and expense.¹³⁰ No party, however, may request, as a matter of right, that any other party admit to more than thirty-five matters that do not relate to the genuineness of documents, unless there is a stipulation or court order increasing the number.¹³¹ Chapter 1334 further provides that (1) *each* request for admission must be full and complete; (2) a request for admission must not contain subparts, or a compound,

127. *Burke v. Superior Court*, 71 Cal. 2d 276, 282, 455 P.2d 409, 416, 78 Cal. Rptr. 481, 488 (1969) (when a party is served with a request for admission concerning a legal question properly raised in the pleadings, that party cannot object simply by asserting that the request calls for a conclusion of law).

128. CAL. CIV. PROC. CODE § 2033(a).

By inserting this prohibition, the Commission is taking a position that is contrary to that now found in [Federal Rule of Civil Procedure] 36(a) as a consequence of the 1970 amendments. Moreover, this prohibition probably is a change in the [prior] law as interpreted by the Supreme Court in *Burke v. Superior Court* [71 Cal. 2d 276, 282, 455 P.2d 409, 416, 78 Cal. Rptr. 481, 488 (1969)]. The Commission concluded that this discovery device should not be employed to penalize parties for their unwillingness to label or characterize in legal terms the pertinent transactions, occurrences, or events.

REPORTER'S NOTES, *supra* note 2, at 99 (general comments on requests for admission).

129. 1983 Cal. Stat. ch. 141, sec. 2, at _____ (amending CAL. CIV. PROC. CODE § 2033(a), (b)).

130. CAL. CIV. PROC. CODE § 2033(c)(1). A party requesting an admission of the genuineness of any documents must attach copies of those documents to the requests, and make the original of those documents available for inspection on demand by the party to whom the requests for admission are directed. *Id.* § 2033(c)(6). "Since memories may differ as to which documents have previously been furnished, and since descriptions of documents may be misinterpreted, the Commission decided that there will be less chance of misunderstanding if copies of the documents involved routinely accompany a request to admit their genuineness."

REPORTER'S NOTES, *supra* note 2, at 100 (copies of documents).

131. CAL. CIV. PROC. CODE § 2033(c)(1).

The Commission concluded that the making of voluminous requests for admission has become so widespread as to constitute a discovery abuse in many cases. By imposing this presumptive limit, the Commission seeks to encourage attorneys to be

conjunctive, or disjunctive question; and (3) no preface or instructions may be included with a set of admission requests, unless approved by rules and forms to be developed by the Judicial Council.¹³² If the initial set of admission requests does not exhaust this limit, the balance may be made in subsequent sets.¹³³ Any particular request for admission that exceeds the statutory limit need not be answered if the party to whom the request is directed states an objection¹³⁴ on that ground.¹³⁵

3. Additional Requests

Chapter 1334 provides that a party may stipulate in writing, with another party, to a greater or an unlimited number of requests for admission.¹³⁶ Any party may request a greater number of admissions by another party if the greater number is warranted by the complexity, or the quantity, of the existing and potential issues in the particular case.¹³⁷

Any party who is requesting or who has already requested more than thirty-five requests for admission not relating to the genuineness of documents must attach to each set of requests a Declaration For Additional Discovery.¹³⁸ The Declaration contains, in pertinent part, statements, signed under penalty of perjury, that (1) the requesting party is familiar with the issues and previous discovery conducted by all the parties; (2) the information sought by each request and any

more thoughtful, restrained, and focused in their employment of this discovery device.

REPORTER'S NOTES, *supra* note 2, at 100 (number of requests for admission). *Cf. supra* note 81 and accompanying text (limitation on number of interrogatories).

132. CAL. CIV. PROC. CODE § 2033(c)(5). *See id.* § 2033.5 (provisions authorizing Judicial Council to develop rules and forms for interrogatories and requests for admission and procedures to be followed). *See also* CAL. CONST. art. 6, § 6 (provisions creating and governing Judicial Council). "This provision is included to prevent evasion of the [35]-request limit . . ."

REPORTER'S NOTES, *supra* note 2, at 100 (preface, instructions, definitions, and subparts).

133. CAL. CIV. PROC. CODE § 2033(c)(1).

134. Objection must be made in accordance with CAL. CIV. PROC. CODE § 2033(f)(2) (provisions governing objections to requests for admission). *Id.* § 2033(c)(1).

135. *Id.*

136. *Id.* § 2033(c)(2).

Although the Commission decided that a presumptive ceiling on the number of admission requests as necessary to curb perceived abuses of this discovery tool, it is also aware that in many cases a greater and even an unlimited number of admission requests is appropriate. In most such cases, the need will be mutual, and this should lead counsel for the parties involved to stipulate away the limit imposed by paragraph (1) of this subdivision. Where this incentive does produce such a stipulation, the trial court is empowered to raise or remove the limit on a case-by-case basis.

REPORTER'S NOTES, *supra* note 2, at 100 (additional requests).

137. CAL. CIV. PROC. CODE § 2033(c)(2).

138. *Id.* § 2033(c)(3).

subpart is necessary for the proper preparation of the case and reasonably requires this number of requests; and (3) none of the requests or subparts is being propounded for any improper purpose, such as to harass the party, or the party's attorney, receiving the requests, or to cause unnecessary delay or needless increase in the cost of litigation.¹³⁹

4. *Response to Requests for Admission and Failure to Serve Response*

Under prior law, a party receiving a request for admission did not have to furnish a response unless that party desired to (1) deny the request, (2) explain why the party could neither admit or deny the request, or (3) issue a written objection on the grounds that the request is privileged, irrelevant, or improper.¹⁴⁰ A party's failure to respond resulted in the request being deemed admitted if (1) the party seeking admission included a warning in the request which stated that a failure to respond would result in an admission, (2) the party seeking discovery served on the party that failed to respond to a notice stating that the requests will be deemed admitted; and (3) the party that failed to respond did not file a motion for relief within thirty days after being served the notice.¹⁴¹ In contrast to prior law, Chapter 1334 requires the party receiving the requests for admission to respond separately to *each* request, in writing and under oath.¹⁴²

139. *Id.* The declaration must also contain substantially the following: (1) the name of the person seeking additional discovery; (2) the party on whose behalf the additional discovery is sought; (3) the name of the party from whom discovery is sought; (4) a statement that the requests will exceed the statutory limit; (5) the number of previously propounded requests for admission (including subparts); (6) a statement that the requesting party has personally examined each of the requests, including any subparts, in the set of requests for admission; (7) a declaration, under penalty of perjury under the laws of California, that the foregoing is true and correct; and (8) a signature of the attorney propounding the requests for admission. *Id.*

140. 1983 Cal. Stat. ch. 141, sec. 2, at _____(amending CAL. CIV. PROC. CODE § 2033(a)).

141. *Id.*

142. CAL. CIV. PROC. CODE § 2033(f).

Under the [prior law] a failure to respond to requests for admission or to a particular request in a set result[ed] in an admission. Often, however, the failure to respond [was] the result of oversight, poor office management, or outright dilatoriness on the part of the attorney for the party to whom they [were] directed. The automatic "deemed" admission that would occur was so severe that the courts began to use [Code of Civil Procedure] § 473 to provide relief from this type of default. This discretionary power to relieve one from an admission made it difficult for the propounding party to rely on the admission, thus injecting a large measure of instability into the operation of [that] discovery method. In 1978 the Legislature acted to curb the trial court's discretion under [Code of Civil Procedure] § 473 to relieve one from a "deemed" admission. Since 1978, a party who include[d] in a

Moreover, each response must either answer the substance of the requested admission or set forth an objection to the particular request.¹⁴³

If a party receiving requests for admission fails to serve a timely response, that party thereby waives *any* objection to the requests, including an objection based on privilege or work product protection.¹⁴⁴ In addition, mandatory monetary sanctions must be imposed

set of admission requests a warning of the consequence of a failure to respond to them [might] subsequently serve a notice that a deemed admission [had] resulted. This notice limit[ed] the court's power to relieve the recipient from the admission to the 30-day period following the service of the notice.

This well-intentioned effort of the Legislature to stabilize the operation of this discovery tool [had] itself produced a spate of appellate decisions. Hypertechnical issues [arose] with regard to the location of the warning-of-consequences that [had to] appear in the request. *See, e.g., Hansen v. Superior Court* [149 Cal. App. 3d 823, 828-29, 197 Cal. Rptr. 175, 178 (1983)]; *Hernandez v. Temple* [142 Cal. App. 3d 286, 290, 190 Cal. Rptr. 853, 855 (1983)]; *compare Barnett v. American-Cal Medical Services, No. 1, Inc.* [156 Cal. App. 3d 260, 264-65, 202 Cal. Rptr. 735, 737-38 (1984)]; *Billings v. Edwards* [120 Cal. App. 3d 238, 246-47, 174 Cal. Rptr. 722, 726-27 (1981)]. Other decisions have wrestled with issues related to the notice of deemed admission. *See, e.g., Enfantino v. Superior Court* [162 Cal. App. 3d 1110, 208 Cal. Rptr. 829 (1984)]; *Carli v. Superior Court* [152 Cal. App. 3d 1095, 199 Cal. Rptr. 583 (1984)]. A Supreme Court decision, *Elston v. City of Turlock* [38 Cal. 3d 226, 695 P.2d 713, 211 Cal. Rptr. 416 (1985)], [had] been necessary to prevent trial courts from being hidebound in the exercise of their discretion to relieve from a deemed admission when the application for relief [was] made within the 30-day period. Once that period [had] passed, of course, the [prior law ousted] the trial courts of any power to grant relief no matter what the circumstances.

The Commission is sensitive to the need of the party propounding requests for admission to learn promptly and enduringly whether the admission is being made. It also does not want to encourage the recipient of admission requests to treat cavalierly the discovery obligations they impose. However, the Commission is convinced that the [prior] system [was] imposing a sanction for non-response or tardy response that [was] out of all proportion to the abuse of discovery that such conduct undoubtedly create[d]. It has concluded that much of the prevailing unsatisfactory situation [arose] from the fact that under [prior] law no response [was] necessary where the recipient [was] willing to make the admission. Thus, the resulting silence [was] ambiguous. [Did] it signify a willingness to make the admission, or, as [was] more likely, [was it] simply attributable to oversight or sloth on the part of the attorney for the other side?

The Commission proposes that a response always be required when this discovery method is employed, as is the case with the other discovery devices. Accordingly, this subdivision would require that the recipient of admission requests answer each request even where that answer would take the form of an admission. While this [provision] would do away with the automatic "deemed" admission feature of the [prior] statute, the Commission [has] also [proposed] in subdivision (k) a procedure for obtaining a "deemed" admission that it believes is a more proportionate way of enforcing the duty to make a prompt response to admission requests.

REPORTER'S NOTES, *supra* note 2, at 101-02 (contents of answer).

143. CAL. CIV. PROC. CODE § 2033(f). Each answer or objection in the response must bear the same number and be in the same sequence as the corresponding request, but the text of the particular request need not be repeated. *Id.* *See also id.* § 2033(f)(1), (2) (required contents of answers and objections).

144. CAL. CIV. PROC. CODE § 2033(k).

by the court on the party failing to serve a timely response.¹⁴⁵ The party that propounded the request may then move for additional monetary sanctions and for an order that the genuineness of any documents and the truth of any matter specified in the requests be deemed admitted.¹⁴⁶ The court must issue this order unless the party failing to serve a timely response has served, prior to the hearing on the motion, a proposed response to the requests for admission that is in substantial compliance with Chapter 1334.¹⁴⁷

5. Response Signature and Oath

Under prior law, a response to a request for admission had to be sworn to by the responding party.¹⁴⁸ Chapter 1334 retains this requirement but also provides that if the officer or agent¹⁴⁹ signing the response on behalf of that party is an attorney, that party waives any lawyer-client privilege and any work product protection during any subsequent discovery from that attorney concerning the identity of the sources of the information contained in the response.¹⁵⁰

6. Sanctions for Unwarranted Refusal to Admit

Prior law provided that if a party responding to a request for admission served a sworn denial in response to a valid request, and the party seeking discovery thereafter proved the truth or genuineness of the request, the party seeking discovery could move for an order requiring the responding party to pay for the reasonable expenses in making that proof, including reasonable attorney's fees.¹⁵¹ This provision, however, inherited a deficiency from the provision's prototype, pre-1970 Federal Rule of Civil Procedure 37(c), which addressed

145. *Id.* (monetary sanctions are imposed pursuant to Code of Civil Procedure § 2023).

146. *Id.*

The Commission recognizes that its proposal is shifting to the party seeking discovery the task of applying to the court to enforce a response to which that party [was] already entitled. However, it believes that the [prior] practice [was] draconian, and that the prospect of a mandatory monetary sanction will in most instances provide sufficient incentive for the party to whom the request is directed to comply with the requirements of this discovery method.

REPORTER'S NOTES, *supra* note 2, at 103 (failure to serve response).

147. CAL. CIV. PROC. CODE § 2033(k) (proposed response must be in substantial compliance with Code of Civil Procedure § 2033(f)(1) (required contents of an answer)).

148. 1983 Cal. Stat. ch. 141, sec. 2, at _____ (amending CAL. CIV. PROC. CODE § 2033(a)).

149. An officer or agent may sign on behalf of a party that is a public or private corporation, partnership, association, or government agency. CAL. CIV. PROC. CODE § 2033(g).

150. *Id.* See *supra* note 95 (Commission's rationale for this provision).

151. 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034(c)).

itself only to the sworn denial of a request, yet did not specifically state that an unwarranted statement of an inability to admit or deny a request was subject to the sanction.¹⁵² Chapter 1334 substantially incorporates the provisions of prior law but cures the deficiency noted above by providing that the sanctions will apply to a party that fails to *admit* the genuineness or truth of a request when requested to do so in accordance with Chapter 1334.¹⁵³

I. Exchange of Expert Witness Information

1. Commencement of Discovery of Expert Witnesses

Prior law permitted a demand for expert witness information to be made not later than the tenth day after a trial date is selected, or seventy days prior to the trial date, whichever is later.¹⁵⁴ Chapter 1336 now provides that a party desiring such an exchange must make the demand not later than ninety days before the trial date.¹⁵⁵ In a case where the parties receive less than 120 days notice of the trial date, however, the court must set an earlier schedule for any exchange of expert witness information.¹⁵⁶

2. Protective Orders

Under prior law, the court, upon motion by any party or expert witness, had the power to issue a protective order to protect a party or expert witness from annoyance, embarrassment, or oppression, or

152. REPORTER'S NOTES, *supra* note 2, at 104 (sanctions for unwarranted refusal to admit). See also Notes of Advisory Committee on Rules—1970 Amendment, FED. R. CIV. P. 37(c), reprinted in 28 U.S.C. Appendix, at 601 (1982) (discussion of deficiency of pre-1970 Federal Rule of Civil Procedure 37(c)).

153. Compare CAL. CIV. PROC. CODE § 2033(o) with 1982 Cal. Stat. ch. 138, sec. 1, at 457 (amending CAL. CIV. PROC. CODE § 2034(c)). See also REPORTER'S NOTES, *supra* note 2, at 104 (sanctions for unwarranted refusal to admit).

154. 1982 Cal. Stat. ch. 1400, sec. 1, at 5336 (amending CAL. CIV. PROC. CODE § 2037).

155. CAL. CIV. PROC. CODE § 2034(b).

156. *Id.*

In view of the different trial-setting practices that prevail in the various counties of the state, [Code of Civil Procedure § 2034(b)] would allow the schedule [to] be accelerated by the court where it is not feasible to provide at least 120 days notice of the trial date. In *St. Vincent Medical Center v. Superior Court* [160 Cal. App. 3d 1030, 206 Cal. Rptr. 840 (1984)], it was held that a trial court is powerless to accelerate the statutory time period for serving a demand to exchange expert witness lists. The proposed subdivision would confer such power in situations where less than 120 days notice of the trial date is given.

REPORTER'S NOTES, *supra* note 2, at 115 (commencement of discovery of expert witnesses).

to determine the reasonableness of witness fees.¹⁵⁷ Incorporating substantially the same provisions, Chapter 1336 additionally provides a list of protective orders, but the list is not exclusive.¹⁵⁸ Among the protective orders stated in Chapter 1336, the court may direct that (1) some or all parties be divided into sides on the basis of their identity of interest in the issues, and that the designation of employed or retained experts be made by any side so created; and (2) a party or a side reduce the list of employed or retained experts designated by that party or side.¹⁵⁹

3. Expert Witness Declaration

Under prior law, each witness list was required to include a declaration with a brief narrative statement of the qualifications of the expert witness and the general substance of the testimony which the witness was expected to give.¹⁶⁰ Chapter 1336 incorporates these requirements but additionally requires (1) a representation that the expert has agreed to testify at the trial, (2) a representation that the expert will be sufficiently familiar with the pending action to submit to a meaningful oral deposition concerning any opinion or basis for any opinion, and (3) a statement of the expert's hourly and daily fee for providing deposition testimony.¹⁶¹

4. Supplemental Exchange of Expert Witness List

Prior law contained no provisions specifically providing for a supplemental exchange of expert witness lists.¹⁶² With the enactment of Chapter 1336, any party previously involved in an exchange of expert witness lists is permitted to submit a supplemental list within twenty days after the initial exchange.¹⁶³

157. 1978 Cal. Stat. ch. 1069, sec. 1, at 3285 (amending CAL. CIV. PROC. CODE § 2037.8).

158. Compare CAL. CIV. PROC. CODE § 2034(e) with 1978 Cal. Stat. ch. 1069, sec. 1, at 3285 (amending CAL. CIV. PROC. CODE § 2037.8).

159. CAL. CIV. PROC. CODE § 2034(e)(5), (6).

160. 1982 Cal. Stat. ch. 1400, sec. 3, at 5337 (amending CAL. CIV. PROC. CODE § 2037.3).

161. See CAL. CIV. PROC. CODE § 2034(f)(2)(C), (D), (E).

162. See REPORTER'S NOTES, *supra* note 2, at 116 (supplemental exchange of expert witness list).

163. *Id.* § 2034(h). See *id.* (contents of supplemental exchange).

A party may have decided not to call an expert on a certain issue on the assumption that none would be called on that issue by an adversary. When the expert witness list exchange provided for in [Code of Civil Procedure § 2034(g)] reveals that this assumption was incorrect, the Commission believes that one who has not previously designated an expert in that particular area should have a right to reconsider his original decision.

REPORTER'S NOTES, *supra* note 2, at 116 (supplemental exchange).

5. Place of Deposition

Prior law contained no provision in regard to the place at which an expert's testimony may be taken.¹⁶⁴ Chapter 1336 specifies that the deposition of a retained or specially employed expert must be taken at a place that is within seventy-five miles of the courthouse where the action is pending.¹⁶⁵ The court, however, may order that the deposition be taken at a more distant place from the courthouse, on motion for a protective order by the party designating an expert witness and on a showing of exceptional hardship.¹⁶⁶

6. Payment of Expert Witness Fee

Under prior law, a party deposing a person retained as an expert by another party had to tender, in advance, the reasonable and customary hourly or daily fee of the expert and a fee covering the expert's time spent in travel to and from the deposition.¹⁶⁷ Chapter 1336 enacts substantially the same provisions, but with two changes: (1) any treating physician or other health care practitioner who will be asked to express an opinion must be compensated in the same manner as any other deposed expert; and (2) the requirement of tendering in advance the fee associated with the expert's travel to and from the place of deposition is eliminated.¹⁶⁸

7. Motion to Augment Expert Witness Information

Prior law permitted "[a] party subject to a duty to exchange expert witness information lists to augment the list simply by 'diligently' giving notice of an intent to call an unlisted expert, and making the new expert available for a deposition."¹⁶⁹ Chapter 1336 provides, with leave of the court, that any party who has engaged in a timely exchange of expert witness information may (1) augment that party's expert witness list and declaration by adding the name and address

164. REPORTER'S NOTES, *supra* note 2, at 117 (place of deposition). See 1980 Cal. Stat. ch. 552, sec. 1, at 1535 (amending CAL. CIV. PROC. CODE § 2037.7).

165. CAL. CIV. PROC. CODE § 2034(i)(1).

166. *Id.*

167. 1980 Cal. Stat. ch. 552, sec. 1, at 1535 (amending CAL. CIV. PROC. CODE § 2037.7).

168. See CAL. CIV. PROC. CODE § 2034(i)(2).

169. See REPORTER'S NOTES, *supra* note 2, at 118; 1982 Cal. Stat. ch. 1400, sec. 4, at 5337 (amending CAL. CIV. PROC. CODE § 2037.4). "The Commission concluded that [the prior law] notice procedure [was] too liberal and almost provide[d] a disincentive to submit a complete list in the first instance." REPORTER'S NOTES, *supra* note 2, at 118 (motion to augment expert witness list).

of any witness whom that party has subsequently retained; or (2) amend that party's expert witness declaration with respect to the general substance of the testimony that an expert, previously designated, is expected to give.¹⁷⁰ Leave of the court, however, may only be granted if a party opposing the motion will not be prejudiced in maintaining that party's action or defense on the merits, and only if specified criteria are met.¹⁷¹ Furthermore, leave must be conditioned on the moving party making the expert immediately available for a deposition, and may include leave to any party opposing the motion to designate additional expert witnesses or to elicit additional opinions from those previously designated.¹⁷²

J. Modifications of Discovery Procedure—Stipulations

Under prior law, parties could stipulate, in writing, that depositions may be taken before any person, at any time or place, on any notice, and in any manner, and when so taken may be used like other depositions.¹⁷³ Prior law contained no provisions for stipulations varying the *other* discovery procedures.¹⁷⁴ Chapter 1334 provides that unless the court orders otherwise, the parties may, by written stipulation, (1) modify discovery by deposition in the same way as prior law,¹⁷⁵ and (2) modify the other discovery procedures provided by Chapter 1334 and Chapter 1336.¹⁷⁶

JTH

170. *Id.* § 2034(k).

171. *Id.* § 2034(k) (specified criteria means all of the following: that the moving party (1) retained the expert or decided to offer the different or additional testimony of the expert after the date specified for exchange of expert witness information; (2) failed to include the name and address of the expert or the general substance of the different or additional testimony of the expert as a result of mistake, inadvertence, surprise, or excusable neglect on the part of the party seeking leave; (3) sought leave to augment or amend promptly after deciding to call the expert or to offer the different or additional testimony; *and* (4) has promptly thereafter served a copy of the proposed expert witness information concerning the expert of the testimony on all other parties who have appeared in the action).

172. *Id.*

173. 1985 Cal. Stat. ch. 444, sec. 2, at _____ (amending CAL. CIV. PROC. CODE § 2019(a)(2)).

174. REPORTER'S NOTES, *supra* note 2, at 17 (modification of discovery procedures).

175. *Compare* CAL. CIV. PROC. CODE § 2021 *with* 1985 Cal. Stat. ch. 444, sec. 2, at _____ (amending CAL. CIV. PROC. CODE § 2019(a)(2)).

176. CAL. CIV. PROC. CODE § 2021.

Civil Procedure; incestuous relations—commencement of action

Code of Civil Procedure § 340.1 (new).

AB 1445 (Klehs); 1986 STAT. Ch. 914

Sponsor: Author

Support: National Action Against Rape

Existing law requires a person to commence an action within one year of attaining the age of eighteen for injuries¹ sustained from incestuous relations that occurred when the victim was a minor.² Chapter 914 expands existing law by increasing the time limit to three years for commencing actions based upon lewd or lascivious acts,³ fornication,⁴ sodomy,⁵ oral copulation,⁶ or penetration of the genital or anal openings⁷ of a minor⁸ by a household or family member.⁹ Chapter 914 does not preclude the courts from commencing the statute of limitations when the injury is discovered rather than the time at which the injury was inflicted, in actions regarding the sexual molestation of a minor.¹⁰

SGF

1. Under Chapter 914, injury or illness includes psychological illnesses, whether or not accompanied by physical illness. CAL. CIV. PROC. CODE § 340.1(b).

2. *Id.* §§ 340, 352.

3. CAL. PENAL CODE § 288 (any person who willfully or lewdly commits any lewd or lascivious act with the intent of arousing, appealing, or gratifying the lust, passions, or sexual desires of the person or child).

4. *Id.* § 285 (incestuous relation includes fornication by close blood relations).

5. *Id.* § 287 (the slightest penetration completes the crime of sodomy).

6. *Id.* § 288(a) (includes any act of copulating the mouth of one person with the sexual organ of another).

7. CAL. CIV. PROC. CODE § 340.1(a) (penetration by any foreign object).

8. *Id.* § 340.1(a). The lascivious acts must occur with a child under the age of 14 years. All other acts upon which the action is based must have occurred before the child attained the age of 18 years. *Id.*

9. *Id.* See *id.* § 340.1(c) (household and family members include parent, stepparent, former stepparent, sibling, stepsibling, any other person related by consanguinity or affinity within the second degree, any other person who regularly resided in the household at the time of the act, or any person who resided at the house six months prior to the act).

10. *Id.* § 340.1(d).

Civil Procedure; judicial arbitration

Code of Civil Procedure § 1141.11 (amended).

AB 4282 (Wyman); 1986 STAT. Ch. 287

Sponsor: Association for California Tort Reform

Existing law requires superior courts with ten or more judges to submit all at-issue civil actions to judicial arbitration if the amount in controversy does not exceed \$25,000.¹ In addition, superior courts with less than ten judges may, under the same circumstances,² allow judicial arbitration if arbitration is authorized by a local rule of the court.³ After the court determines the amount in controversy,⁴ the case may be submitted to arbitration at any conference at which all parties are present or represented by counsel.⁵ Under Chapter 287, no local rule of a superior court allowing judicial arbitration may dispense with the conference requirement.⁶

MWL

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1. CAL. CIV. PROC. CODE § 1141.11(a) (judicial arbitration prescribed by statute).
 2. The court must also determine that judicial arbitration is in the best interests of justice. *Id.* § 1141.11(b).
 3. *Id.* (judicial arbitration by local rule).
 4. *Id.* § 1141.11(a), (b) (the amount in controversy is determined by the opinion of the court and the decision is not appealable).
 5. *Id.* § 1141.16(a). The conference is to take place no later than 3 months after the at-issue memorandum is filed or no later than 90 days before trial, whichever occurs first. *Id.*
 6. *Id.* § 1141.11(e).

Civil Procedure; limitations of actions

Code of Civil Procedure § 352 (amended).

SB 1810 (L. Greene); 1986 STAT. Ch. 1161

Sponsor: Attorney General

Support: Department of Corrections

Opposition: American Civil Liberties Union

Under existing law, a civil action must be commenced¹ within a

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1. An action is commenced when the complaint is filed. CAL. CIV. PROC. CODE § 350.

prescribed period of time after a cause of action has arisen.² If a person entitled to bring an action is imprisoned on a criminal charge of less than a life term when the action arises, existing law provides for the tolling³ of the limitations period during the prison term.⁴ Chapter 1161 restricts existing law by declaring this tolling provision inapplicable to actions brought by inmates, other than for damages, when the action relates to conditions of confinement and specified federal civil rights actions.⁵

KGM

2. *Id.* § 312 (time of commencing actions in general). *See also id.* §§ 315-349.4, 364(a)-(f) (time of commencing specific actions).

3. The tolling of an action is the temporary suspension of the statute of limitations during a party's absence from a jurisdiction or during the age of minority. BLACK'S LAW DICTIONARY 1334 (5th ed. 1979).

4. CAL. CIV. PROC. CODE § 352. *But cf.* CAL. PENAL CODE § 2601(e) (authorizing prison inmates to initiate civil actions).

5. CAL. CIV. PROC. CODE § 352. *See* 42 U.S.C. § 1983 (1983) (civil action for deprivation of rights by persons acting pursuant to color of state law). 42 U.S.C. § 1983 gives a remedy to parties deprived of constitutional rights, privileges, and immunities by an official's abuse of position. *Monroe v. Pape*, 365 U.S. 167, 172 (1961). An action under 42 U.S.C. § 1983 is a proper remedy for a state prisoner who is making a constitutional challenge to conditions of his prison life. *Preise v. Rodriguez*, 411 U.S. 475, 499 (1973). *See also* *Green v. Dunke*, 480 F.2d 624, 628 n.7 (9th Cir. 1973). Civil rights legislation should generally not be interpreted narrowly; section 1983 was designed as remedial legislation for deprivation of federal constitutional and statutory rights. *Id.* Right of reasonable access to courts and legal assistance extends to inmates using 42 U.S.C. § 1983 to remedy a denial of constitutional rights occurring during incarceration. *Nolan v. Scafati*, 430 F.2d 548, 551 (1st Cir. 1970). *Cf.* *Wilson v. Garcia*, 105 S. Ct. 1938, 1942 (1985) (the statute of limitations for 1983 actions is that applicable for tort actions in the state in which the plaintiff is suing). The statute of limitations for tort actions in California is generally one year from the date of injury. CAL. CIV. PROC. CODE § 340.

Civil Procedure; notice of *lis pendens*, directed verdict

Code of Civil Procedure § 581 (repealed and new); § 587.5 (new); §§ 409, 431.10, 437c, 470, 471, 572, 585, 597, 630, 631.8, 998 (amended).

AB 2965 (Peace); 1986 STAT. CH. 540

Sponsor: Author; California State Bar Association

Existing law provides that a person who requests a notice of *lis*

*pendens*¹ must serve² such notice upon each adverse party added by amendment.³ In an apparent response to *Bowman v. Superior Court*,⁴ Chapter 540 expands existing law by requiring a notice of *lis pendens* to also be served upon any party who is later brought into the action pursuant to specified sections of the Code of Civil Procedure,⁵ or any other applicable provision of law.⁶

Under existing case law in an action tried before a jury, the court may direct a verdict when there is no substantial conflict in the evidence.⁷ Chapter 540 provides a statutory procedure for making a motion for directed verdict.⁸ Under Chapter 540, any party in a jury trial may move for a directed verdict after all parties have presented their evidence, unless the court specifies an earlier time.⁹ The court may grant a directed verdict as to some, or all, of the issues involved in the action.¹⁰ Unless the court specifies otherwise, the directed verdict operates as an adjudication upon the merits.¹¹ In actions

1. The *lis pendens* must be filed at the county recorder's office in the county where the property is situated, and must include the names of the parties, the object of the action or cross-action, and a description of the affected property. CAL. CIV. PROC. CODE § 409(a). See generally, 3 B. WITKIN, SUMMARY OF CALIFORNIA PROCEDURE, *Actions* §§ 265-270 (3rd ed. 1985).

2. A copy of the *lis pendens* must be mailed, by registered or certified mail, with return receipt, to all known adverse parties and all owners of record listed in the most recent information possessed by the county assessor. *Id.* § 409(c). These requirements do not apply to actions brought under Code of Civil Procedure §§ 1230.010-1273.050 (eminent domain statutes). *Id.*

3. *Id.* § 409(c). The party must be added by an amendment granted as a matter of course or by the discretion of the court. *Id.*

4. 174 Cal. App. 3d 195, 219 Cal. Rptr. 854 (1985) (Code of Civil Procedure § 409(c) only required service of a copy of a *lis pendens* to be made upon a party brought into the action pursuant to Code of Civil Procedure §§ 472 or 473).

5. CAL. CIV. PROC. CODE §§ 385 (substitution of transferee, representative, or successor in interest for the named defendant); 387 (intervention); 389 (indispensable parties); 472 (right to one amended answer); 472a (demurrer); 473 (amendments permitted by court); 474 (defendant originally designated by a fictitious name); 576 (amendment of any pleading or pretrial conference order). CAL. CIV. PROC. CODE § 409(c).

6. CAL. CIV. PROC. CODE § 409(c).

7. *Estate of Lances*, 216 Cal. 397, 400, 14 P.2d 768, 768 (1932). The court stated: A directed verdict may be granted "only when, disregarding conflicting evidence and giving to the plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given."

Id. See generally, 7 B. WITKIN, CALIFORNIA PROCEDURE, *Trial and Judgment* §§ 408-426 (3rd ed. 1985).

8. CAL. CIV. PROC. CODE § 630.

9. *Id.* § 630(a). A party may raise the motion without waiving the right to trial by jury. *Id.*

10. *Id.* § 630(b). The action must proceed on any remaining issues, and no final judgment may be entered prior to the termination of the action. The final judgment must reflect the verdict ordered by the court. *Id.*

11. *Id.* § 630(c).

concerning injury to a person or property, Chapter 540 provides that when a directed verdict is granted on the basis that a defendant was without fault, no other defendant may attribute fault to, or comment on, the absence or involvement of that defendant.¹²

Existing law specifies when a judgment may be granted if a defendant fails to answer a complaint.¹³ Chapter 540 specifies when a default judgment may be entered on a cross complaint.¹⁴

TJL

12. *Id.* § 630(d). Chapter 540 also states that a directed verdict is effective without any assent of the jury. *Id.* § 630(e).

13. *Id.* § 585.

14. *Id.* § 585(e). A default may be entered against the plaintiff or cross-defendant after the plaintiff or cross-defendant has been served and has failed to file an answer, demurrer, notice of motion to strike, notice of motion to transfer, notice of motion to quash service of summons or to stay or dismiss the action, or notice of filing a petition for a writ of mandate within the time specified by the summons, or such other time as may be allowed. *Id.*

Civil Procedure; service of subpoena on minor

Code of Civil Procedure § 1987 (amended).

AB 3924 (Margolin); 1986 STAT. CH. 605

Sponsor: Children Legislative Organ United by Travina

Under existing law, service of a subpoena is effected by delivering personally to the witness a copy of the subpoena¹ and appropriate witness fees.² This provision, prior to Chapter 605, did not address whether substitute service of a subpoena on a minor³ was permissible.⁴

1. A ticket containing the substance of the subpoena may be served in lieu of a copy of the subpoena. CAL. CIV. PROC. CODE § 1987(a).

2. *Id.* Witness fees, if demanded by the witness, are to compensate the witness for travel to and from the place designated, and for one day of attendance there. Civil employees under Government Code §§ 68097.1-68097.8 are exempt from the provisions governing service of a subpoena. *Id.* See also CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE §§ 4.39, 4.44 (Supp. 1986).

3. CAL. CIV. CODE § 25 (definition of a minor).

4. Compare 1981 Cal. Stat. ch. 184, sec. 2, at 1105 (amending CAL. CIV. PROC. CODE § 1987(a)) with CAL. CIV. PROC. CODE § 1987(a). See also 3 B. WITKIN, CALIFORNIA PROCEDURE, ACTIONS § 810 (3d ed. 1985) (service on a minor is generally governed by Code of Civil Procedure § 416.60 (service of a summons and complaint on a minor)).

Chapter 605 now provides that service of a subpoena on a minor must be made on the minor's parent, guardian, conservator, or similar fiduciary, or if such person cannot be located with reasonable diligence, then service must be made on (1) any person having the care or control of the minor, (2) the person with whom the minor resides, or (3) the minor's employer.⁵ Service must additionally be made on the *minor* if the minor is twelve years of age or older.⁶

JTH

5. CAL. CIV. PROC. CODE § 1987(a).

6. *Id.* See also CAL. JUD. COUNS., 1969 ANN. REP. TO GOV. & LEG., at 53 (1969) (comments on dual service requirement for minors twelve years of age or older).

Civil Procedure; subpoena duces tecum—personal records of consumer

Code of Civil Procedure § 1985.3 (amended).
SB 1980 (Marks); 1986 STAT. CH. 1209

Under existing law, a subpoena duces tecum may be used to compel production of any record¹ under the control of a witness.² If a specified witness³ is subpoenaed to produce personal records⁴ maintained⁵ for a consumer,⁶ the party seeking production must notify the consumer personally⁷ at least ten days prior to the production

1. CAL. CIV. PROC. CODE § 1985 (for purposes of this analysis, record means any book, document, or other thing under the control of the witness).

2. *Id.* A witness is a person whose declaration under oath is received as evidence for any purpose, whether the declaration is made on oral examination, or by deposition or affidavit. *Id.* § 1878.

3. *Id.* § 1985.3(a)(1) (specified witness includes a physician, hospital, state or national bank, state or federal association, state or federal credit union, trust company, security brokerage firm, insurance company, underwritten title company, attorney, accountant, institution of the Farm Credit System, or telephone corporation).

4. *Id.* (personal records are records that pertain to a consumer and are maintained by a specified witness). See *supra* note 3 (list of specified witnesses).

5. "Maintained" is interpreted to include documents entrusted to a witness, as well as documents prepared by a witness. *Sasson v. Katash*, 146 Cal. App. 3d 119, 124, 194 Cal. Rptr. 46, 48 (1983).

6. CAL. CIV. PROC. CODE § 1985.3(a)(2) (definition of consumer).

7. Notice must include a copy of the subpoena duces tecum and an affidavit supporting the subpoena. Additionally, the notice is required to state that records concerning the consumer

date specified in the subpoena.⁸ The purpose of existing law is not to create a special privilege for personal records, but to protect a consumer's right to privacy by creating a procedure to apprise a consumer of the subpoena, and to provide an opportunity to make a motion to quash the proposed subpoena.⁹ Chapter 1209 expands the list of specified witnesses to include (1) a pharmacist; (2) a pharmacy; (3) a psychotherapist;¹⁰ and (4) a private or public preschool, elementary school, or secondary school.¹¹

Under existing law, service of notice on the consumer may be made (1) personally to the consumer; (2) at the consumer's last known address; (3) by certified mail, return receipt requested, to the consumer's last known address; or (4) to the consumer's attorney of record, if the consumer is a party.¹² Chapter 1209 provides that if the consumer is a minor,¹³ service must be made to the minor's parent, guardian, conservator, or similar fiduciary, or, if such person cannot be located with reasonable diligence, to (1) any person having the care or control of the minor; (2) one with whom the minor resides; or (3) the minor's employer.¹⁴ Service must additionally be made on the *minor*, if the minor is twelve years of age or older.¹⁵ Failure of the subpoenaing party¹⁶ to comply with these service requirements is sufficient basis for the witness to refuse to produce any personal record sought by the subpoena duces tecum.¹⁷

JTH

are being sought, and must detail the action that should be taken if the consumer objects to the production of these records. *Id.* § 1985.3(b), (e).

8. *Id.* § 1985.3(b)(1), (2).

9. *Sasson*, 146 Cal. App. 3d at 124, 194 Cal. Rptr. at 48-49. See CONTINUING EDUCATION OF THE BAR, CALIFORNIA CIVIL DISCOVERY PRACTICE §§ 4.57A-4.57B (Supp. 1986).

10. CAL. CIV. PROC. CODE § 1985.3(a)(1) (psychotherapist as defined in Evidence Code § 1010).

11. CAL. CIV. PROC. CODE § 1985.3(a)(1).

12. *Id.* § 1985.3(b)(1).

13. CAL. CIV. CODE § 25 (definition of a minor).

14. CAL. CIV. PROC. CODE § 1985.3(b)(1). See also 3 B. WITKIN, CALIFORNIA PROCEDURE, Actions § 810 (3d ed. 1985) (service on a minor is generally governed by Code of Civil Procedure § 416.60 (service of a summons and complaint on a minor)).

15. *Id.* See also JUDICIAL COUNCIL OF CALIFORNIA, 1969 ANNUAL REPORT TO THE GOVERNOR AND THE LEGISLATURE, at 53 (1969) (comments on dual service requirement for minors 12 years of age or older).

16. CAL. CIV. PROC. CODE § 1985.3(a)(3) (definition of subpoenaing party).

17. *Id.* § 1985.3(j). See also *Sasson*, 146 Cal. App. 3d at 119, 194 Cal. Rptr. at 125.

Civil Procedure; supplemental briefing—new issue

Government Code § 68081 (repealed and new).

SB 2321 (Petriss); 1986 STAT. Ch. 1098

Sponsor: Attorney General

Opposition: California Judges Association; Judicial Council

Existing law provides that the supreme court or courts of appeal may grant a rehearing after their own decision in most cases.¹ Chapter 1098 requires that before the supreme court, court of appeal, or the appellate department of a superior court renders a decision² based upon an issue that was not proposed or briefed by any party to the proceedings, the court must afford the parties an opportunity to present their view on that matter, through supplemental briefing.³ In addition, Chapter 1098 provides that if the parties are not given an opportunity to present their views, the court is required to grant a rehearing upon the timely petition of any party.⁴

MGB

1. CAL. R. CT. 27(a). *See id.* (exceptions). A party seeking a rehearing either in the court of appeal or in the supreme court must petition the court within 15 days after the filing of the decision. *Id.* 27(b). A decision of the supreme court becomes final 30 days after filing unless the court orders a shorter time. A decision in a court of appeal becomes final as to that court 30 days after filing. *Id.* 24(a). An order of the supreme court granting a rehearing must be signed by at least four assenting judges and filed with the clerk. If no order is made before the decision becomes final, the petition is deemed denied. *Id.* 27(e).

2. CAL. GOV'T CODE § 68081 (in any proceeding other than a summary denial of a petition for an extraordinary writ).

3. *Id.*

4. *Id.*

Civil Procedure; uninsured motorist arbitration proceedings

Code of Civil Procedure § 86 (amended).

AB 255 (McAlister); 1986 STAT. Ch. 88

(Effective May 13, 1986)

Sponsor: California State Automobile Association

Existing law grants to superior courts exclusive jurisdiction over

uninsured motorist arbitration proceedings.¹ Existing law, however, also provides municipal and justice courts with jurisdiction over all arbitration-related petitions,² if based on the subject matter of a pending action properly filed in a municipal or justice court.³ Chapter 88 corrects this apparent statutory conflict by specifically excluding uninsured motorist arbitration proceedings from municipal court jurisdiction, bringing them within the jurisdiction of the superior court.⁴

PCS

1. CAL. INS. CODE § 11580.2(f)(1).

2. See CAL. CIV. PROC. CODE §§ 1290-1294.2 (providing for commencement of arbitration proceedings upon the filing of a petition and establishing venue, jurisdiction, and costs regarding such judicial proceedings).

3. *Id.* § 86(a)(10).

4. *Id.* Compare *id.* with 1985 Cal. Stat. ch. 1383, sec. 1, at 608 (amending CAL. CIV. PROC. CODE § 86) (including uninsured motorist arbitration proceedings within the jurisdiction of municipal and justice courts).

Civil Procedure; vehicle seizure and sale

Vehicle Code §§ 9803, 9804 (new); §§ 6701, 9911, 9950 (amended).
SB 2382 (Robbins); 1986 STAT. CH. 1212
Sponsor: Department of Motor Vehicles

Existing law provides that any person, upon receiving notice from the Department of Motor Vehicles of its intent to seize and sell a vehicle¹ for delinquent registration, may request a hearing to contest the delinquency.² Chapter 1212 requires that upon completion of all administrative appeals the party be notified in writing by the Department of Motor Vehicles of the right to request a court review of the order.³ Chapter 1212 requires that the hearing request be made within ninety days.⁴

MWL

1. CAL. VEH. CODE § 670 (definition of vehicle).

2. *Id.* § 9801.

3. *Id.* § 9804(b).

4. *Id.* Compare *id.* § 9804 with *id.* § 14401 (90-day filing period for court review of actions affecting driving privileges).